No. 90-5193-CSY
Status: GRANTED
CAPITAL CASE

Title: Dawud Majid Mu'Min, Petitioner
v.
Virginia

Docketed:
July 18, 1990

Court: Supreme Court of Virginia

Counsel for petitioner: Mu'Min,Dawud Majid, Blume,John H.

Counsel for respondent: Terry,Mary Sue

Entry	Date	Note	Proceedings and Orders
1	Jul 18 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Aug 16 1990		Brief of respondent Virginia in opposition filed.
4	Aug 23 1990		DISTRIBUTED. September 24, 1990
9	Sep 28 1990		REDISTRIBUTED. October 5, 1990
11	Oct 9 1990		Petition GRANTED. limited to Questions 1 and 2 presented by the petition. Justice Souter OUT.
			**********
12	Oct 16 1990	G	Motion of petitioner for appointment of counsel filed.
13	Oct 19 1990		DISTRIBUTED. October 26, 1990.
14	Oct 29 1990		Motion for appointment of counsel GRANTED and it is ordered that John H. Blume, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the petitioner in this case.
15	Nov 29 1990		Joint appendix filed.
16	Dec 7 1990		Brief of petitioner Dawud Mu'Min filed.
17	Dec 7 1990	G	Motion of National Jury Project for leave to file a brief as amicus curiae filed.
18	Dec 17 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 20, 1991. (2ND CASE)
19	Dec 20 1990		Record filed.
		*	Supreme Court of VA-one vol.
20	Dec 26 1990		Record filed.
		*	Supreme Court of VA-one vol.
21	Jan 7 1991		Motion of National Jury Project for leave to file a brief as amicus curiae GRANTED.
22	Jan 7 1991		Brief of respondent VA filed.
23	Jan 9 1991		CIRCULATED.
24	Feb 7 1991	X	Reply brief of petitioner Mu,Min filed.
25	Feb 20 1991		ARGUED.

ORIGINAL

No. 90-5193

IN THE SUPREME COURT OF THE UNITED STATES

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court violated the petitioner's rights under the sixth and fourteenth amendments by refusing to allow questions on voir dire of potential jurors regarding what the veniremen had read or heard about the crime.
2. Whether the trial court violated the petitioner's sixth and eighth amendment rights by refusing to allow questions on voir dire of potential jurors regarding what the veniremen had read or heard about the crime.
3. Whether the trial court violated the petitioner's sixth amendment right by failing to strike for cause two jurors who indicated that their ability to deliberate impartially would be hampered.
4. Whether the petitioner's trial was rendered fundamentally unfair by the prosecutor's repeated use of and reference to an unrelated conviction of the petitioner.
5. Whether the trial court deprived the petitioner of due process by allowing into evidence statements made by the petitioner during custodial interrogation.
6. Whether Virginia's death penalty statute violates the constitutional prohibition on cruel and unusual punishment.

7. Whether the imposition of the death penalty in this case is violative of the eighth amendment because it was imposed under the influence of passion, prejudice and arbitrary factors.

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IN THE SUPREME COURT OF THE UNITED STATES

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Dawud Majid Mu'Min, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court in this case is reported and may be cited as Mu'Min v. Commonwealth, 389 S.E.2d 886 (Va. 1990).

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Virginia on March 2, 1990, and a petition to rehear the case was denied by that court on April 20, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), the Petitioner having asserted below and herein deprivations of right secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

The sixth amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]

The eighth amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Va. Code Ann. § 18.2-31 (1988) states, in pertinent part:

> Capital murder defined; punishment. -- The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . . .
>
> (c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;
> (d) The willful, deliberate and premeditated killing

of any person in the commission of robbery while armed with a deadly weapon[.]

Va. Code Ann. § 19.2-264.2 (1983) provides as follows:

> Conditions for imposition of death sentence. -- In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

STATEMENT OF THE CASE

The petitioner was indicted by the Grand Jury for the 31st Judicial District of Virginia for capital murder in violation of Va. Code Ann. § 18.2-31 (1988). Trial was held before a jury from April 17 to April 20, 1989, after which the jury returned a verdict finding the petitioner guilty of murder while he was confined in a state correctional facility or in the custody of an employee thereof, or while in the commission of a robbery while armed with a deadly weapon (Trans. 4/20/89 at 239). Thereafter a sentencing hearing was held before the same jury, whereupon the jury recommended that the punishment be death (Trans. 4/24/89 at 96). On June 12, 1989, after receiving a presentence report, the trial court fixed the petitioner's punishment as death (Trans. 6/12/89 at 53). An appeal was taken to the Supreme Court of Virginia, which issued its decision affirming the judgment March 2, 1990 (App. at 1). A petition for rehearing was filed by the petitioner which was denied by the court on April 20, 1990 (App. at 36).

On September 22, 1988, Gladys Nopwasky was found bleeding on the floor of Dale City Floors, a carpet and flooring business where she worked, in Ashdale Plaza, Prince William County, Virginia (Trans. Vol. I at 222, 264). When police arrived at the scene she was being attended to by two rescue squad units; the police also observed that the shop was in disarray (Trans. Vol. I at 223). The rescue squad personnel found that Mrs. Nopwasky was not breathing and did not have a pulse, although her heart was still beating (Trans. Vol. I at 276). Although she was transported to a hospital, she eventually died. Mrs. Nopwasky's husband, who ran Dale City Floors, testified that on that day the air conditioning unit on the roof serving the shop was being serviced (Trans. Vol. I at 251).

At that time, the petitioner was an inmate at Haymarket Field Unit No. 26 of the Virginia Department of Corrections, serving a 48-year sentence. The morning of September 22, 1988, the petitioner was transported to the Dale City headquarters of the Virginia Department of Transportation, where he was assigned to a work detail and supervised by a Department of Transportation employee. The petitioner testified that at that time he had a screwdriver with a clip that he always carried in his shirt

pocket to fix his television and glasses (Trans. Vol. III at 267-68). He broke for lunch at about 11:30 a.m., and began walking around the grounds there. Eventually he walked over to a wire fence around the perimeter of the grounds, stepped over it, and walked along Interstate 95 toward Dale City and Ashdale Plaza (Trans. Vol. III at 280). At the time, he intended to go to the plaza to price oriental rugs which he was considering as a birthday present for a friend (Trans. Vol. III at 281).

During his walk, the petitioner saw Dale City Floors and went inside to ask about rugs. When he entered, he saw a woman sitting at a desk talking on the telephone. After she finished she came up to the petitioner and asked if she could help him. The petitioner started asking her about the price of oriental rugs and she quoted some prices. The petitioner commented to her that the prices seemed high, and when she appeared angry at this he changed the subject (Trans. Vol. III at 288-89). He then asked about shipping a carpet, and the woman asked him why he would want it shipped. He told her he could not carry away anything he bought there, and after she looked at his clothes she determined that he was a prisoner (Trans. Vol. III at 290). She then began asking the petitioner about what it was like to be locked up and the sexual aspect; the petitioner responded that he just didn't think about it (Trans. Vol. III at 291).

She then asked the petitioner about making love with white women. The petitioner told her to "get the hell out of here,"

after which she spit in his face. He then struck her in the face with his open hand (Trans. Vol. II at 292). She then began screaming and calling the petitioner a "nigger," and as she made another motion toward him he struck her again with the back of his hand (Trans. Vol. II at 293-94). The woman then kicked him in the groin and the petitioner fell to the floor, pulling her down as well. She then kicked herself away from the petitioner and came back at him with a knife, slashing at him. After warding her off, the petitioner grabbed the screwdriver from his shirt pocket and struck her in the chest and neck (Trans. Vol. III at 298). After she fell, the petitioner noticed blood coming from her nose and mouth.

Realizing she was hurt, the petitioner tried to help her by checking her pulse and looking through desk drawers and a pocket-book for something to help her (Trans. Vol. III at 302). He then went to a bathroom in the back of the store and got a wet washcloth, which he held against the wound on her neck (Trans. Vol. III at 303-04). The petitioner left the store using the back door with change he had grabbed from a desk to get some ice (Trans. Vol. II at 305). After walking around trying to figure out what to do, he came back to the store and starting wiping up with a handkerchief the things he could remember touching, and washed his hands. He then went out the back door and went back to the highway department grounds (Trans. Vol. III at 309-10).

Once there, he cleaned up, changed shirts, and threw away the shirt he had been wearing (Trans. Vol. III at 311).

The Commonwealth presented evidence concerning the autopsy of Mrs. Nopwasky, which showed that she had suffered eight stab wounds to the thorax and four stab wounds to the neck area (Trans. Vol. II at 13). It also presented the testimony of Keith Shifflett, an inmate at the Haymarket Correctional Unit. Shifflett stated that on the evening of September 22, 1988 he saw the petitioner in the shower and noticed blood on his body. Shifflett testified that after asking what happened, the petitioner fell on his knees, started crying and talking about having hurt and killed somebody (Trans. Vol. II at 235-36). Robert Owens, an inmate at the Prince William, Virginia, Adult Detention Center, testified for the Commonwealth that he was in the same cell with the petitioner after the petitioner was transferred there in late September 1988. Owens testified that the petitioner told him about the incident at Dale City Floors and that the petitioner told him he had been in the store before and that on the day in question he had gone to the store to rob it. Owens stated that the petitioner told him he struck and stabbed Mrs. Nopwasky with a metal spike after she spurned his advances (Trans. Vol. III at 13-14).

Prior to trial, the petitioner submitted a list of questions to ask members of the jury panel during voir dire. Among them were questions concerning whether the prospective jurors had read

or heard anything about this case from the media, what they had read, seen, or heard, from whom they acquired this information, and whether, what, and with whom they had discussed the case prior to trial. At a pretrial hearing on proposed voir dire questions, the trial court ruled that the petitioner could not ask these questions, stating that he could only question the panel concerning whether they had heard, read or seen anything about the case and whether that information would affect the prospective jurors' impartiality (Trans. 4/14/89 at 57, 58-59). The petitioner objected to this ruling (Trans. 4/14/89 at 58, 59, 74), arguing that he was entitled to ask these questions under the fifth, sixth, eighth and fourteenth amendments to the federal Constitution (Trans. 4/14/89 at 39, 74).

During jury selection, the trial court asked the panel the following question:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?

(Trans. Vol. I at 16.) Sixteen of the panel members indicated in the affirmative (Trans. Vol. I at 16-18). The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

> Have any of you expressed or formed an opinion of the innocence or guilt of the accused?
>
> Is there any person who has already formed an opinion as to the innocence or guilt of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(Trans. Vol. I at 18-19.) One of the 16 responded in the affirmative to these questions and was dismissed for cause (Trans. Vol. I at 21). Another person was added to the panel, and additional voir dire was completed by each party.

The jury panel then left the courtroom in preparation for additional voir dire in groups of four. After they left, the petitioner moved to strike for cause all those jurors who had indicated they had acquired information about the case (Trans. Vol. I at 51-52). The petitioner asserted that under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution he was entitled to question those jurors who stated they did have some knowledge of the case specifically about what it was they knew, and that the fact that they indicated they could be impartial was not enough to satisfy the constitutional requirements. The trial court overruled the motion (Trans. Vol. I at 52-53). The petitioner then submitted in further support of this motion newspaper articles concerning the case (Trans Vol. I at 54), and proffered the testimony of Mark Woolverton, a police

department spokesperson, who would have testified that he made statements to the press concerning the petitioner at the direction of the Commonwealth Attorney's office. The court again denied the motion and the request for Woolverton's testimony (Trans. Vol. I at 56-57).

Seven of the original 15 on the panel who answered that they had heard, read, or seen something about the case were eventually seated on the panel after strikes for cause and peremptory strikes (Trans. Vol. I at 16-18, 197).[1] One other person, Paul Tsou, who was placed on the panel after a strike for cause and eventually chosen as a juror, indicated during questioning that he had previously heard and discussed the case with someone (Trans. Vol. I at 25, 197).

On appeal, the Supreme Court of Virginia held that a defendant may not, as a matter of right, question prospective jurors about what they had previously read, heard, or seen about the case. It ruled that a defendant only has a constitutional right to know whether a prospective juror, in reliance on the information previously obtained, has formed an opinion and whether the juror can stand indifferent in the cause (App. at 11). A dissenting opinion written by Justice Whiting and joined by two other justices stated that it was manifest error for the trial court to refuse to allow any questions necessary to establish a

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[1]These included Carrington Boothe, Albert Runion, Sheila Walters, John Taylor, Rita Wolfe, Evelyn Thorpe, and Sandra Dame.

factual and objective basis for assessing juror impartiality, especially in light of the large amount of pretrial publicity engendered by this case (App. at 26). The dissent stated that the defendant had a constitutional right under the sixth and fourteenth amendments to the United States to address the "content" questions to the prospective jurors (App. at 29-30). The petitioner filed a petition for rehearing on this issue before the Virginia appellate court, which petition was denied (App. at 40).

During voir dire of the panel, the petitioner also moved to strike Alexandrina Santiago and Gregory Dailey. Ms. Santiago indicated that she knew the victim personally and was on a first name basis with her (Trans. Vol. I at 102-03). The petitioner argued that, despite her statements that she could be objective, Santiago's relationship with the victim created a substantial danger she could not deliberate impartially (Trans. Vol. I at 107-08). The trial court summarily denied this motion and the petitioner excepted (Trans. Vol. I at 109). Dailey stated, in response to a question of whether jury service would be of any undue hardship, that he worked for a small company and his absence would jeopardize its business (Trans. Vol. I at 26). Dailey also stated that his absence would hamper his business financially and that it would rush and hamper his deliberations (Trans. Vol. I at 88). The petitioner moved to strike Dailey for cause, but the trial court refused the motion stating that he did

not hear Dailey state he would be rushed (Trans. Vol. I at 95-96).

The Virginia Supreme Court found no merit to the assignments of error in failing to strike Santiago and Dailey, ruling that their responses fully supported the trial court's conclusion that they were qualified to sit on the jury (App. at 14).

Prior to trial, the petitioner brought a motion in limine to prevent the Commonwealth from making references to the nature or number of crimes of which the petitioner had been previously convicted (Trans. 4/14/89 at 16-17). The trial court denied this motion, ruling that because the Commonwealth was required to prove that the petitioner was confined in a state correctional institution in order to prove the crime charged in the indictment, it could offer proof of nature and number of crimes of which the petitioner had been convicted (Trans. 4/14/89 at 29-30). At trial, the Commonwealth was allowed to introduce testimony from a Department of Corrections employee that the petitioner was serving a 48-year sentence for first-degree homicide at the time of the crime charged (Trans. Vol. II at 99). An order of conviction for first-degree homicide was also admitted by the trial court (Trans. Vol. III at 6-7).

On appeal, the Virginia Supreme Court ruled that any error in admitting the evidence of other crimes was harmless. It held that because the petitioner had admitted the fact that he was serving a sentence for homicide in an out-of-court statement made

to investigators which was admitted at trial, any error in allowing evidence of the prior crime was not reversible error (App. at 16).

The petitioner also made a pretrial motion to suppress two of his statements made during custodial interrogation on September 30 and October 1, 1988. At a hearing on this motion, Officer David Watson, who questioned the petitioner, testified that he advised the petitioner of his Miranda warnings on each occasion (Trans. 1/30/89 at 21, 25). He also admitted that he had brought up the evidence police had obtained a number of times and that the petitioner did not have an attorney at the time of questioning (Trans. 1/30/89 at 27-28). The petitioner testified that during this questioning he was tired and frustrated, which caused him to say things during the interview he wouldn't have said otherwise (Trans. 1/30/89 at 32-33). After this testimony, the trial court ruled that the petitioner understood what was going on at the time of the questioning and denied the motion to suppress the two statements (Trans. 1/30/89 at 51-52).

The Supreme Court of Virginia upheld this ruling, stating that the transcript of the police questioning did not reveal any evidence of coercion, and that the questioning was done after the petitioner had been given his Miranda rights (App. at 7).

Prior to trial, the petitioner submitted a motion to dismiss the capital murder indictment on the ground that Virginia's capital sentencing statute violates the eighth and fourteenth amend-

ment in that (1) the statutory "vileness" and "future dangerousness" predicates offer no guidance to the jury in determining whether to impose the death penalty, (2) use of "future dangerousness" violates the prohibition on double jeopardy, (3) the death penalty itself violates the prohibition of cruel and unusual punishment, and (4) Virginia does not provide meaningful appellate review of death sentences (Trans. 4/7/89 at 5). The trial court summarily denied the motion, and the petitioner excepted (Trans. 4/14/89 at 11). On appeal, the Supreme Court of Virginia also summarily upheld the constitutionality of the Virginia statute based upon other cases it had decided (App. at 5).

On appeal, the petitioner argued that the death sentence was imposed under the influence of passion, prejudice and other arbitrary factors. In addition to what transpired at trial, the petitioner also pointed out that during argument over the admissibility of evidence at the sentencing hearing, the trial court made comments questioning the relevancy of certain evidence submitted by the petitioner (Trans. 4/21/89 at 154). The Virginia Supreme Court upheld the validity of the death sentence, and held that the trial court's remark was not prejudicial, because it might not have been heard by the jury and the evidence was admitted in any event (App. at 19).

REASONS FOR ALLOWING THE WRIT

I. THE PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO ALLOW QUESTIONING OF PROSPECTIVE JURORS CONCERNING WHAT THEY HAD PREVIOUSLY HEARD OR READ ABOUT THE CASE.

Despite the petitioner's repeated attempts, the trial court refused to allow him to question the prospective jurors about precisely what they had read, seen, or heard about the case prior to the trial. Instead, during voir dire questions were only asked about whether the jurors had read, heard, or seen anything about the case, and if so, whether that would impair their ability to decide the case impartially. The record shows that eight of those who were actually seated on the jury that convicted the petitioner and sentenced to death had read or heard something about the case, but is silent as to the content of the pretrial publicity to which they were exposed.

The failure of the trial court to allow the petitioner to question the prospective jurors about the content of the publicity to which they had been exposed deprived him of his sixth amendment right to an impartial jury, made applicable to the states by the fourteenth amendment. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). The sixth amendment and the due process clause mandate not only the formality of a jury trial but also that the jury be impartial. Ristaino v. Ross, 424 U.S. 589, 595

n.6 (1976). The constitutional standard for jury impartiality is whether he can lay aside his opinion and render a verdict based on the evidence presented. Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984).

Although the trial court applied this standard in assessing whether those jurors who had heard, read or seen something about the case were qualified, still its failure to allow questioning concerning precisely what they had read or heard frustrated the petitioner's ability to obtain a fair jury. As pointed out in Irvin v. Dowd, supra, 366 U.S. at 728, "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." More recently, this Court stated that a juror's assurances that he is equal to the task of being impartial cannot be dispositive of his rights, and "it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting Irvin v. Dowd, supra, 366 U.S. at 723).

Thus, the fact that jurors state they would stand impartial in the cause and not be affected by pretrial publicity cannot be deemed sufficient to guarantee the defendant's right under the sixth amendment. The defendant still must be free to show that the prospective juror possesses information and harbors feelings that would render him partial. Murphy v. Florida, supra, 421

U.S. at 794. The Supreme Court of Virginia's determination that the defendant does not have a constitutional right to pose questions that examine precisely what information the prospective jurors have been exposed to is simply at odds with this Court's decisions establishing that the defendant is entitled to probing voir dire to determine "possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equipment v. Greenwood, 464 U.S. 548, 554 (1984).

Indeed, this Court's decisions indicate that the questioning of jurors as to the content of the prejudicial information to which they have been exposed is not merely desirable but necessary in establishing whether they are impartial or not. In Wainwright v. Witt, 469 U.S. 412, 423 (1985), this court clarified the standard for excluding jurors based upon their views of capital punishment. It was stated in the course thereof that "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Id. at 423. Similarly, in Dobbert v. Florida, 432 U.S. 282, 302-03 (1977), a defendant's claim that his right to an impartial jury was undermined by the pretrial publicity of his case was rejected because it rested solely upon the quantum of media publicity. The opinion noted that the defendant pointed to no specific portion of the record, particularly voir dire, which would require a finding that the

method of juror selection or character of the jury was constitutionally unfair. Id. at 303; see also Patton v. Yount, supra, 467 U.S. at 1038 (there must be fair support in the record for the state court's conclusion that the jurors would be impartial).

These cases demonstrate that establishing either that the trial itself was impermissibly affected by pretrial publicity or that individual jurors were prejudiced by their pretrial exposure to information about the case must be on the basis of specific voir dire questions and answers appearing on the record. Yet the trial court in the instant case prevented the petitioner from establishing such prejudice as to members of the jury panel by prohibiting questions concerning the content of the information to which they had been exposed. As noted above, the determination of a juror's impartiality cannot be made solely on the basis of prospective juror's assurance that he or she would be impartial. Murphy v. Florida, supra, 421 U.S. at 800. The petitioner here was entitled to go beyond the trial court's perfunctory questioning concerning the jurors' pretrial exposure to information about the case and ask questions that would allow him to determine whether the information the jurors obtained rendered them partial.

The constitutional necessity of the content questions proffered by the petitioner is supported by the decisions of the lower federal courts. For example, in United States v. Affleck,

776 F.2d 1451, 1455 (10th Cir. 1985), the court noted that the determination of whether jurors harbor prejudices against the defendant is normally accomplished through voir dire, but held that "[i]t is not . . . enough to ask a juror the stock questions, 'have you formed an opinion as to the accused's innocence or guilt' or 'will you be able to determine guilt based only on the evidence presented?'" It then cited Irvin v. Dowd, supra, and Murphy v. Florida, supra, for the proposition that prospective jurors' assurances that they are impartial is not enough, and the defendant must be allowed to show the existence of partiality on their part through an examination of all the circumstance. Although the sufficiency of the voir dire was upheld there, this was only after the court found that the prospective jurors had completed a questionnaire asking detailed questions about their knowledge of the case's participants and surrounding events and that the parties were allowed to probe the jurors about any troublesome matters. United States v. Affleck, supra, 776 F.2d at 1451.

Similarly, in Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), the court reversed a conviction where the trial court had questioned prospective jurors concerning whether they had heard or read anything about the case but refused to allow the defendant to question them further about what information they had been exposed to. The court held that "in the absence of examination designed to elicit answers which provide an objective

basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient to test that impartiality.'" Id. at 638 (quoting United States ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir.), cert. denied, 372 U.S. 978 (1963)). Although the court conceded that jurors need not have read or heard nothing about a case, "whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on the juror's own assessment of self-righteousness without something more." Silverthorne v. United States, supra, 400 F.2d at 639 (emphasis in original). Because the trial court did not determine what information the prospective jurors had accumulated prior to trial, it had no way to objectively assess their impartiality, thereby prejudicing the defendant's right to a fair jury. Id. at 638.

And in Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985), the court reversed the district court's decision denying Jordan a writ of habeas corpus, finding that the voir dire at Jordan's state trial was insufficient to protect his right to an impartial jury under the sixth amendment. After noting that Jordan's case had been the subject of much publicity, the court found that the trial court's denial of individualized voir dire to determine whether potential jurors were biased by that publicity, and only asking whether they had previously formed an opinion and could act impartially, violated Jordan's right to an impartial jury.

It held that the law requires that jurors must be questioned as to whether they were exposed to pretrial publicity, and if so, further inquiry into the nature of the exposure is required. Id. at 1281. The Jordan court relied in part on the decision in United States v. Davis, 583 F.2d 190 (5th Cir. 1978), where a defendant was again prevented by the trial court from questioning potential jurors about the content of any publicity to which they were exposed, relying only on responses from the jurors that they could be impartial. In reversing, the Davis court found such questioning to be "cursory" and held:

> The court should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed.

Id. at 196; see also United States v. Dellinger, 472 F.2d 340, 374-75 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (where there is substantial pretrial publicity concerning a criminal case, trial court is obligated to conduct individualized voir dire concerning the impact of the publicity upon the potential jurors).

The decisions clearly indicate that the kind of perfunctory voir dire allowed to the petitioner in this case is insufficient to protect an accused's right to an impartial jury and violates his sixth amendment rights. As pointed out in the dissenting opinion below, the record discloses an unusual amount of pretrial publicity, especially since it involved the killing of a local

resident allegedly by a convict working outside prison for the Department of Transportation (App. at 26-27). In light of the notoriety of the case, it was improper for the trial court here to rely solely upon the jurors' assertions that they could be impartial since "[t]he juror is poorly placed to make a determination as to his own impartiality." United States v. Davis, supra, 583 F.2d at 197. The petitioner was entitled to voir dire of the prospective jurors concerning what they had read and heard about the case, because it is only through such questioning that an objective determination as to their prejudice, vel non, can be determined. Silverthorne v. United States, supra, 400 F.2d at 638.

Despite the existence of these decisions mandating "content" questions on voir dire as a matter of a defendant's sixth amendment right, the court below held that such questions did not have to be asked because the prospective jurors were asked whether they could stand indifferent in the cause. In support, the Supreme Court of Virginia cited only United States v. Haldeman, 559 F.2d 31, 67-68 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), which held that it was not necessary to ask "content" questions. However, as pointed out by the dissent below (App. at 34-35), reliance on the Haldeman decision is misplaced. First, the decision in Haldeman explicitly agreed that certain standards of criminal justice mandate that veniremen be questioned concerning what they have read and heard about the case and how it has

affected their attitudes toward the trial. 559 F.2d at 69. Secondly, that court also stated that it would have been error for the trial court to rely solely upon the prospective jurors' assurances that they could be fair, and that the trial court there asked other questions concerning how close they had followed the Watergate case and their sources of information. Id. at 67 n.51. In this case, the trial court had no objective facts upon which to assess a juror's bias and did rely solely upon their statements that they would be fair.

Therefore, the Supreme Court of Virginia erred in relying on the Haldeman decision and in finding that the petitioner had not been deprived of his sixth amendment right. That right was violated by the trial court's refusal to allow questioning of the prospective jurors concerning what they had been exposed to in the way of pretrial publicity. The trial court's reliance upon the jurors' statements of impartiality was constitutionally inadequate to assure the petitioner's right to a fair trial and requires that the petitioner's conviction be reversed.

II. THE PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY IN THE SENTENCING PHASE WHEN TRIAL COURT REFUSED TO ALLOW QUESTIONING OF PROSPECTIVE JURORS CONCERNING WHAT THEY HAD PREVIOUSLY HEARD OR READ ABOUT THE CASE.

The trial court's error in not allowing questioning of the prospective juror's about what information they had been exposed to prior to the trial not only deprived the petitioner of his

sixth amendment right, but also his eighth amendment right, which is applicable because this was a capital murder prosecution and he was sentenced to death. This Court has recognized "that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983). In this case, that higher degree of scrutiny should be applied to the selection process of the petitioner's jury which not only found him guilty of capital murder, but recommended that the death penalty be imposed. As noted above, the trial court did not allow the petitioner to question the prospective jurors about what they had read and heard about the case, thereby allowing jurors to be seated who were not demonstrably impartial or free of preconceived notions about the petitioner.

That this inadequate voir dire violated the petitioner's right to be free from an arbitrary and capricious jury decision to impose the death penalty is demonstrated by this Court's decision in Turner v. Murray, 476 U.S. 28 (1986). There, a judgment imposing the death penalty under Virginia's capital sentencing scheme was overturned where the trial court refused to allow voir dire questioning of the jury panel concerning their racial prejudices, where it was alleged that the black defendant killed a white person. This Court noted not only that a greater degree of scrutiny is demanded of cases involving the death penalty, but also that Virginia's death penalty system gives the jury greater

discretion than other systems that have been considered by the Court. Id. at 34. It also was stated that the risk of prejudice infecting a capital sentencing proceeding "is especially serious in light of the complete finality of the death sentence." Id. at 35. Although the conviction was not overturned, the death sentence was because of the risk produced by the inadequate voir dire. Id. at 37-38.

The inadequate voir dire in the instant case, as discussed in Part I, supra, also requires that at the very least the sentence of death imposed upon the petitioner be reversed. As pointed out in the Turner decision, the risk of an arbitrary or capricious imposition of the death penalty is heightened where the voir dire allowed inadequately screens jurors for prejudice. This is especially true under Virginia's death penalty scheme which grants wide discretion to the jury. Because of this unacceptable risk of arbitrary sentencing and the greater degree of scrutiny applicable here, the sentence imposed should be reversed because of the trial court's inadequate protection of the petitioner's right to an impartial jury under the sixth, eighth and fourteenth amendments.

III. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS RIGHT TO AN IMPARTIAL JURY WHEN IT FAILED TO STRIKE TWO JURORS FOR CAUSE.

The principles discussed above relating to the petitioner's constitutional right to an impartial jury also were violated when

the trial court refused the petitioner's motions to strike two jurors for cause. The first, Ms. Santiago, stated that she knew the victim and patronized her store; indeed, Ms. Santiago referred to the victim by her first name during voir dire (Trans. Vol. I at 102-03). The second, Mr. Dailey, indicated that because of his employment with a small business and the time jury service would take up, he would be hampered in his deliberations and he would feel rushed (Trans Vol. I at 26, 88).

Again, the sixth amendment and the due process clause mandate not only the formality of a jury trial but also that the jury be impartial. Ristaino v. Ross, supra, 424 U.S. at 595 n.6. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, supra, 366 U.S. at 722. The central inquiry in the determination of whether a juror should be excused for cause is whether the juror harbors some feeling that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, supra, 469 U.S. at 424.

In this case, both Santiago and Dailey indicated that their ability to decide the cause impartially would be hampered, in one case because of the personal relationship Santiago had with the victim and in the other Dailey's feeling that he would be rushed

in deliberating on the case. While neither Santiago nor Dailey was eventually seated on the jury, the trial court's retention of them on the jury panel forced the petitioner to use peremptory challenges that would not otherwise have been used. The right of peremptory challenges is one of the most important of rights secured to the accused, and a denial or impairment of that right is reversible error without a showing of prejudice. Swain v. Alabama, 380 U.S. 202, 219 (1965). The trial court's action resulted in an impairment of the petitioner's right to peremptory challenges and requires that the judgment below be reversed.

IV. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY ALLOWING EVIDENCE OF UNRELATED CRIMES.

Despite the petitioner's pretrial motion to prevent the Commonwealth from introducing evidence of prior crimes, the Commonwealth was allowed to make repeated references to the fact that the petitioner had been convicted of murder in 1973. Even though the Commonwealth was required to prove that the petitioner was incarcerated at the time of the crime alleged under Va. Code Ann. § 18.2-31(c) (1988), it was possible to prove that the petitioner was a prisoner without making reference to the fact that he had previously been convicted of murder. This could have been done either by records indicating merely the fact of incarceration or by testimony from correction officials stating that the petitioner was a prisoner on the date of the alleged offense.

Because the only relevant inquiry under the offense charged was whether the petitioner was incarcerated, not the basis for that incarceration, evidence of the fact that he had been convicted of murder was wholly irrelevant and could serve only to unfairly prejudice him in the eyes of the jury. This Court has recognized that the introduction of evidence of prior unrelated crimes by a criminal defendant may be so extremely unfair as to violate the fundamental conceptions of justice embodied in the due process clause of the fourteenth amendment. Dowling v. United States, 110 S. Ct. 668, 674-75 (1990). Where the prosecution is allowed to introduce such evidence under circumstances where it is without basis and wholly irrelevant, due process is violated. Foster v. Watkins, 423 F. Supp. 53, 55 (W.D.N.C. 1976), aff'd, 570 F.2d 501 (4th Cir. 1978).

The circumstances here are of the type that deprived the petitioner of a fundamentally fair trial. Evidence of his prior conviction for murder served no real purpose at trial other than to convey to the jury that he was a bad person or that he had a character trait that made him prone to violence. That purpose is clearly irrelevant and improper. See Fed. R. Evid. 404(b) (evidence of other crimes is inadmissible to prove the character of the person). Evidence of the other crime irreparably and unfairly prejudiced the petitioner, and reversal of the conviction is required.

V. THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE TRIAL COURT ALLOWED INTRODUCTION OF STATEMENTS HE MADE DURING CUSTODIAL INTERROGATION THAT WERE INVOLUNTARY.

Even though the petitioner had been read his Miranda rights prior to speaking to Officer Watson and did not specifically invoke either his right to remain silent or to have an attorney present, the fact that Miranda warnings were read is not dispositive of the admissibility of custodial statements made by a criminal defendant. It is now well established that a defendant's statement that is not given as a free and rational choice violates due process and is inadmissible at trial. Colorado v. Connelly, 479 U.S. 157 (1986); Townsend v. Sain, 372 U.S. 293 (1963). Even assuming no violation of the prophylactic Miranda rule is apparent, the statement is still inadmissible if it is involuntary in that it is not the product of a rational intellect and a free will. Mincey v. Arizona, 437 U.S. 385, 397-98 (1978).

The hearing on the petitioner's motion to suppress the statements he gave to Owens shows that those statements were not the product of the petitioner's free will. The petitioner testified that he was tired and frustrated at the time of the questioning and that this caused him to say things he would not have otherwise said (Trans. 1/30/89 at 32-33). In Ashcroft v. Tennessee, 322 U.S. 143, 153-54 (1944), a defendant's statements made after he had been held incommunicado and questioned repeatedly were not voluntarily given because of the fatigue the defendant was under at the time of the statements. The petitioner

here was questioned under similar circumstances; he was incarcerated at the time of the statements and was tired and subject to the suggestions of Owens.

Moreover, the transcript of the statements indicates that Owens played upon the petitioner's fatigue by falsely representing that he was trying to help the petitioner and that he already had information proving the petitioner's guilt. In Spano v. New York, 360 U.S. 315, 323-24 (1959), this Court condemned the police practice of posing as a false friend of the subject of interrogation merely for the purpose of extracting an incriminating statement from him. Owens engaged in precisely the kind of conduct that Spano condemned. When this police overreaching is combined with the mental and physical state of the petitioner at the time of his statements, the inescapable conclusion is that the statements were not the result of a voluntary act. Although the statements themselves were not incriminating, they were at variance from his trial testimony and surely prejudicial to the petitioner's case by indicating that he had lied in the past. As such, the admission of the statements was prejudicial and the error in admitting them is cause for reversing the judgment below.

VI. THE PETITIONER'S DEATH SENTENCE MUST BE REVERSED BECAUSE VIRGINIA'S DEATH PENALTY SCHEME IS VIOLATIVE OF THE EIGHTH AMENDMENT.

A fundamental teaching of this Court's decisions involving death penalty statutes is that the scheme employed by the state for invoking this ultimate of penalties must not allow a jury to make the determination without guidance. Sentencers may not be given unbridled discretion in determining the fate of those charged with capital crimes, and statutes must be structured to prevent the penalty from being imposed in an arbitrary and unpredictable fashion. California v. Brown, 479 U.S. 538, 545 (1987); Gregg v. Georgia, 428 U.S. 153, 197 (1976).

This fundamental tenet is violated by the statutory scheme under which the petitioner was sentenced. Va. Code Ann. § 19.2-264.2 (1983) allows the jury to impose the death sentence if it finds that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman[.]" This "vileness" predicate gives a Virginia jury essentially no guidance in determining which crimes should be punished by death. This conclusion is supported by this Court's decision in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), where Oklahoma's statutory scheme allowing the imposition of the death penalty upon a jury finding that the crime was "especially heinous, atrocious or cruel" was struck down as violative of the eighth amendment's requirement that jury discretion be suitably restricted. There is no reasonable distinction be-

tween the language used in the unconstitutional Oklahoma statute and the "vileness" predicate of Virginia's statute. In both cases, there is still the unbridled discretion condemned by the Constitution, and for that reason the petitioner's death sentence should be reversed as it was obtained under an unconstitutional statute.

The same argument applies with respect to the other predicate contained in Va. Code Ann. § 19.2-264.2, "future dangerousness." Nothing in either the statutory or case law of Virginia provides guidance as to the standard of proof necessary to support a finding that a defendant, based upon his prior record, poses a continuing danger to the community. The jury is given open-ended discretion in deciding when the proof has risen to a level necessary to establish the fact of future dangerousness. Without providing meaning and guidance, the sentencing scheme allows the jury to arbitrarily and capriciously impose the ultimate punishment of death, a result that violates the eighth amendment and requires reversal of the petitioner's sentence.

The Virginia statutory scheme for imposing the death penalty also is unconstitutional because it fails to allow for a meaningful avenue of appellate review of the imposition of that penalty. As pointed out in Pulley v. Harris, 465 U.S. 37, 44 (1984), nearly every state that has adopted a death penalty scheme has also mandated automatic appellate review of a judgment imposing the death penalty. Indeed, such review is necessary under the eighth

amendment to assure that the death penalty is not imposed in an arbitrary manner. Gregg v. Georgia, 428 U.S. 153, 198 (1976). Virginia law also provides for automatic review of death sentences under Va. Code Ann. § 17-110.1 (1988). The Supreme Court of Virginia is to review any sentence of death to determine whether it was "imposed under the influence of passion, prejudice or any other arbitrary factor," and whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id., § 17-110.1(C).

However, unlike the appellate review provided for in other jurisdictions, Virginia's sentencing scheme does not provide for meaningful review. For example, in Pulley, supra, 465 U.S. at 53, it was noted that there was a requirement that the jury specify the special circumstance justifying imposition of the death penalty so that the appellate court could adequately determine whether the death penalty was actually justified. And in Proffitt v. Florida, 428 U.S. 224, 251 (1976), Florida's death penalty scheme was upheld where meaningful appellate review was made possible by the requirement that the trial judge justify the imposition of the death penalty with written findings.

Virginia's scheme provides no such safeguards to assure that the death penalty was not arbitrarily applied. There is no requirement that the trial court or jury specify precisely which of the statutory aggravating factors was relied upon in determining to impose the death penalty. Absent such a finding, there is no

way for the Virginia Supreme Court to conduct the meaningful review of the sentence mandated by the eighth amendment.

Additionally, the review that is mandated by Va. Code Ann. § 17-110.1 is conducted in a wholly cursory and arbitrary manner. An examination of Virginia Supreme Court cases conducting this statutory review usually state in only a vague and general manner that the sentence was neither imposed under passion or prejudice or based upon other arbitrary factors. This certainly is not the kind of in-depth, meaningful review contemplated by the eighth amendment.

For these reasons, Virginia's death penalty scheme is unconstitutional and the petitioner's sentence under that scheme should be reversed.

V I. THE IMPOSITION OF THE DEATH SENTENCE IN THIS CASE IS UNCONSTITUTIONAL BECAUSE IT WAS THE RESULT OF PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS.

The petitioner's sentence of death in this case also should be reversed because its imposition was the result of arbitrary factors. As pointed out in parts I and II, supra, there was extensive pretrial publicity resulting in prejudice to the petitioner and a trial filled with passion against him. This prejudice was not weeded out by the trial court and, in light of the greater scrutiny applicable to death sentences, mandates reversal of the petitioner's sentence.

Additionally, the sentencing phase of the trial was infected by the court's comments upon relevant evidence submitted by the petitioner in opposition to the death penalty. The trial court derided the relevancy of a Virginia Department of Transportation regulation offered by the petitioner, which effectively conveyed to the jury that the petitioner's case in opposition to the death penalty was not worthy of respect. Although the Supreme Court of Virginia indicated that the comment was harmless because it might not have been heard by the jury, there is nothing in the transcript indicating that the comment was not made in open court for all therein to hear. The qualitative difference in the death penalty and the corresponding need for greater reliability in the decision-making process cannot tolerate the kind of prejudice injected into the proceedings by the trial court. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Therefore, the death penalty imposed upon the petitioner here must be reversed.

CONCLUSION

For the foregoing reasons, the petitoner, Dawud Majid Mu'Min, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia convicting him of murder and sentencing him to death.

Respectfully Submitted,

Dawud Majid Mu'Min

Dawud Majid Mu'Min
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Attorney Pro Se

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 20th *day of* April, 1990.

Dawud Majid Mu'Min, a/k/a, etc., Appellant,

against Record No. 890899
Circuit Court No. 23103

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1990 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 2nd *day of* March, 1990.

Dawud Majid Mu'Min,
a/k/a David Michael Allen, Appellant,

against Record No. 890899
Circuit Court No. 23103

Commonwealth of Virginia, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 12th day of June, 1989.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant on the merits and on the issue of ineffective assistance of counsel, each a fee of $1,550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and Hassell, JJ., and Poff, Senior Justice

DAWUD MAJID MU'MIN A/K/A
DAVID MICHAEL ALLEN

v. Record No. 890899

COMMONWEALTH OF VIRGINIA

OPINION BY SENIOR JUSTICE RICHARD H. POFF
March 2, 1990

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
H. Selwyn Smith, Judge

Dawud Majid Mu'Min, also known as David Michael Allen, was tried by a jury on an indictment charging capital murder. Invoking the three grounds defined in subsections (c), (d), and (e) of Code § 18.2-31 (Repl. Vol. 1988) (now, subsections (3), (4), and (5) of § 18.2-31), the indictment alleged that the killing had been committed while the accused "was a prisoner confined in a State or local correctional facility or while in the custody of an employee thereof, or while in the commission of robbery, while armed with a deadly weapon, or during the commission of or subsequent to rape".

The verdict form submitted to the jury in the first phase of the bifurcated trial quoted the three grounds alleged in the indictment and instructed the jury to "strike out" any ground "that you do not find beyond a reasonable doubt." The jury marked through the third ground and returned a guilty verdict based upon the first and second grounds.

The verdict form submitted to the jury in the penalty phase of the trial quoted the language of Code § 19.2-264.4(C) defining the "dangerousness" and the "vileness" predicates and

instructed the jury to strike out the language of either predicate "if either you do not unanimously find." The jury, "having considered the evidence in mitigation of the offense," returned the form unaltered and "unanimously fix[ed] . . . punishment at death." After reviewing the probation report required by Code § 19.2-264.5, the trial court entered judgment confirming the conviction and imposing the penalty fixed by the jury. We have consolidated the defendant's appeal of the conviction with the automatic review of the sentence, Code § 17-110.1(A) and (F), and accorded both priority on our docket, Code § 17.2-110.2.

I. THE EVIDENCE

Most of the facts and circumstances related to the attack which led to the victim's death are drawn from the defendant's testimony at trial. Convicted in 1973 of first degree murder and sentenced to a term of 48 years, the defendant was an inmate at Haymarket Field Unit #26. On the morning of September 22, 1988, he and five other prisoners were transported to the Virginia Department of Transportation's Dale City Headquarters (VDOT) where they were assigned to a work detail supervised by a VDOT employee.

During the course of his work that morning, the defendant damaged the point of a screwdriver which he repaired with the use of a bench grinder. At the same time he used the grinder to sharpen a short piece of metal (sometimes referred to as a "highway spike") into the shape of a screwdriver, added a wooden handle, and attached the device to his shirt pocket with a

holder fashioned from a paper clip. When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Napwasky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued.[1] According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top part of her pants" and pulled them "down right . . . by the thighs." Mrs. Napwasky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the nose and mouth and . . . a trickle of blood . . . from the neck." The defendant "checked her pulse to make sure she was okay", placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the

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[1]Other evidence showed, however, that Dale City Floors had not stocked oriental carpets for eleven years.

shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack along the highway. The defendant testified that he had not raped his victim.

A customer of the carpet store found Mrs. Napwasky lying on the floor and called a rescue squad. A paramedic testified that he had found her "face up on her back on the floor in a pool of blood that was around her head and upper body"; that she was naked below the waist and her blouse and brassiere had been pulled above her breasts; that although her heart was beating, "she was breathless and pulseless" because there was "no . . . fluid for it to actually pump." The autopsy report identified 16 cuts and puncture wounds on the face, neck, chest, and left arm. A neck wound, three inches deep, severed the jugular vein. A wound four inches deep in the left chest cavity penetrated the left lung. Evidence of numerous "blunt-force trauma injuries" was found on her face and forehead. The victim's genital area was undisturbed.

The Commonwealth introduced the testimony of several of the defendant's fellow inmates concerning his conduct following arrest. One witness testified that the defendant had fallen to his knees, crying and saying that he had killed somebody. Another said that the defendant had told him that he had

murdered and robbed his victim. A third prisoner testified that the defendant had conceived an escape plan involving the use of violence. In a search of the defendant's cell while he was awaiting trial, the authorities found a piece of metal taken from a typewriter page stand and an ear bracket from a pair of spectacles. Both appeared to have been sharpened.

II. PRE-TRIAL ISSUES

A. Constitutional Challenges

The defendant filed a motion to dismiss the indictment on the ground that the capital murder statutes are unconstitutional. The trial court rejected the several challenges articulated in a detailed memorandum. The defendant incorporated the memorandum in his brief filed in this Court. All the arguments urged by the defendant have been considered and rejected. See the decisions cited in Spencer v. Commonwealth, 238 Va. 563, 568-69, 385 S.E.2d 850, 853-54 (1989); Watkins v. Commonwealth, 238 Va. ___, ___, 385 S.E.2d 50, 56-7 (1989); Buchanan v. Commonwealth, 238 Va. 389, 412-13, 384 S.E.2d 757, 771 (1989), cert. denied, ___ U.S. ___, 58 U.S.L.W. 3468 (1990); and Pope v. Commonwealth, 234 Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), cert. denied, 485 U.S. 1015 (1988). We reaffirm our decisions in those cases.

B. Motion to Suppress

The trial court overruled the defendant's motion to suppress statements he had made to an officer in two interviews conducted prior to his arrest. Initially, he stated that, upon hearing a scream, he had entered the carpet store to find "a

white guy" with "long blond hair" who was "bending over" with "his pants pulled down" and a "lady . . . laying on the floor" alive but "bleeding through her mouth [and] nose". The white man fled, Mu'Min said, and the defendant "went out the [back] door." Abandoning that account later, the defendant acknowledged that he had entered the store to inquire about an oriental rug and had struck Mrs. Napwasky twice during a bitter quarrel over prices. In significant respects, Mu'Min's two statements were irreconcilably inconsistent. They were no more incriminating than his testimony at trial.

Attacking the trial court's ruling permitting selective portions of his extra-judicial statements to be read into evidence, the defendant contends that his statements were not voluntary because, he says, they were made while he was "incarcerated on a prior charge", while he "was tired and scared", and at a time when he was given no "opportunity to speak with legal counsel." He declares on brief that he "merely said what the Investigator wanted him to say in the misguided belief that the Investigator was going to help him."

> Admissibility of a defendant's statements is an issue to be decided by the [trial] court, which evaluates the credibility of the witnesses, resolves any conflicts in the testimony, and weighs the evidence as a whole. The court must decide whether the defendant knowingly and intelligently relinquished and abandoned his rights. The court's determination is a question of fact based upon the totality of the circumstances. This factual finding will not be disturbed on appeal unless plainly wrong.

Watkins v. Commonwealth, 229 Va. 469, 477, 331 S.E.2d 422, 429-30 (1985) (citations omitted), cert. denied 475 U.S. 1099 (1986).

A review of the transcript of a tape recording of the testimony at the suppression hearing discloses no evidence of coercion. The two interviews were conducted at appropriate hours by a single investigator, the officer fully, definitively, and repeatedly advised Mu'Min of each of his Miranda rights, and the defendant expressly waived those rights.

The defendant was qualified, both by training and experience, to make a knowing and voluntary waiver. Mu'Min, a graduate of a private "prep" school, had earned a college degree in business administration and was literate in four languages. In his testimony at the suppression hearing, he acknowledged that, in response to questions propounded to him by the investigator, he had agreed that he understood each element of the Miranda warnings, that he knew the interviews were being recorded, and that, because he had been represented by an attorney appointed to defend him at his 1973 murder trial, he was already aware that he was entitled to the advice of counsel. Nevertheless, he readily assented to the question whether he was "willing to talk . . . without consulting a lawyer or having a lawyer present."

We hold that the record completely supports the trial court's ruling denying the defendant's motion to suppress his extra-judicial statements.

C. Discovery

Prior to trial, Mu'Min filed a motion to require the Commonwealth to disclose "the factual basis" for a claim of future dangerousness, one of the statutory predicates for the death penalty. Specifically, he requested detailed information concerning evidence of prior convictions, unadjudicated criminal charges, psychological evaluations, and any threatening statements made by the defendant which the Commonwealth intended to introduce at the penalty trial. Defense counsel claimed that, without such information, "the possibility arises of trial by ambush".

The trial court granted the motion, and the Commonwealth complied with the defendant's request. The Commonwealth then moved for disclosure[2] of those "facts in mitigation defendant intends to introduce at the penalty phase". The Commonwealth's Attorney explained that "we are merely asking for the same thing as defense asked of the Commonwealth". Granting the Commonwealth's motion, the court stated that the purpose of discovery is "to prevent total surprise" and that discovery "runs [in] both directions".

On appeal, Mu'Min contends that the trial court infringed his due process rights by not limiting the Commonwealth's discovery rights to those granted expressly by Rule 3A:11(c) and

[2]It is of no consequence that both Mu'Min and the Commonwealth labelled their pleadings as motions for bills of particulars. The titles are irrelevant; judged by their substance, the two pleadings are motions for discovery.

Code § 19.2-264.3:1(D).[3] Assuming without deciding that, as Mu'Min argues, the trial court erred in granting the Commonwealth's motion, and assuming further that the error was not invited as the Attorney General contends, we hold that any such error was harmless beyond a reasonable doubt.[4]

The information the defendant disclosed was couched in broad generalizations. Indeed, Mu'Min's response to the discovery order contained little more than a routine recitation of the mitigating factors enumerated in Code § 19.2-264.4(B) and a reference to a "history of psychiatric evaluations". It did not contain the names of any potential witnesses or any other evidence Mu'Min intended to offer. Moreover, the transcript of proceedings at the penalty trial shows that the Commonwealth offered no evidence to rebut the testimony Mu'Min adduced as evidence in mitigation. The defendant cannot logically claim that he was prejudiced by a pre-trial order granting the Commonwealth's discovery motion when his response disclosed nothing which gave the Commonwealth an unfair advantage at trial.

[3]If Mu'Min's argument can be read as a claim to a right to surprise or "ambush" the Commonwealth, we reaffirm our recent holding that no such right exists. Bennett v. Commonwealth, 236 Va. 448, 459, 374 S.E.2d 303, 311 (1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1765 (1989).

[4]Although a mere violation of Rule 3A:11(c) or Code § 19.2-264.3:1(D) would not require this "more stringent standard" of harmless error review, see Dowling v. United States, ___ U.S. ___, ___, 110 S.Ct. 668, 671 (1990), we have applied that standard here because Mu'Min frames the issue in constitutional terms.

D. Jury Selection

1. Content Questions

In advance of trial, defense counsel submitted for approval a list of questions designed, in part, to determine what a prospective juror had seen, read, or heard about the case. Such questions are of a type characterized at bar as "content questions". The trial court refused to allow counsel to propound such questions, and Mu'Min argues on appeal that the court's refusal constituted "a denial of due process of law" and a violation of his right to "trial by an impartial jury".[5]

Sixteen of the 20 members of the jury panel had indicated on voir dire that they had acquired some information from the news media or from conversations with acquaintances. In reply to questions propounded, both by the court and by counsel during the course of an examination that consumed 172 pages of the

[5]Mu'Min also argues that the court's ruling "violated the express mandate of Code § 8.01-358". The defendant refers to the second paragraph of that statute which directs "[a] juror, knowing anything relative to a fact in issue, [to] disclose the same in open court." Construing that statute, we have said:

> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine whether the parties have had sufficient opportunity to do so.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063 (1984).

transcript, all members of the panel attested, collectively and in groups of four, that they had not formed any opinion based upon the information they had acquired, were not sensible of any bias or prejudice, could enter the jury box with an open mind, and were able to render a fair and impartial verdict based upon the law and the evidence admitted at trial.

We agree with the Attorney General that an opportunity to pose the kind of "content questions" the defendant proposed is not a matter of right. See United States v. Haldeman, 559 F.2d 31, 67-8 (D.C. Cir 1976) (en banc), cert. denied, 431 U.S. 933 (1977) (affirming trial court's rejection of "content questions" on voir dire related to pre-trial publicity). The information a person acquires about a case from others may or may not prove to be the facts of the case as developed by evidence admitted at trial. Such information may or may not induce a person to form an opinion before trial. Any opinion formed before trial may or may not affect a person's ability as a juror to reach a different conclusion at trial.

Of course, parties litigant may properly inquire whether a prospective juror has acquired information about the case before trial. It does not follow that litigants have a constitutional right to know what that information is. They are entitled to know only whether the prospective juror, in reliance upon the information acquired, has formed an opinion and, if so, whether the juror can yet "stand indifferent in the cause". Code § 8.01-358; L.E. Briley v. Commonwealth, 222 Va. 180, 184-87, 279 S.E.2d 151, 154-55 (1981).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961) (citations omitted). Quoting and applying this rule in a later case, the Supreme Court upheld the seating of a juror who had said on voir dire, "My experience of [the accused] is such that right now I would find him guilty." Murphy v. Florida, 421 U.S. 794, 802 n.5 (1975).

Here, none of the members seated on the panel had formed an opinion based upon the information acquired before trial, and all had affirmed on oath that they could stand indifferent in the cause. We hold, therefore, that the trial court did not err in disallowing the content questions proposed by the defendant.

2. Seating Two Jurors

Renewing objections raised during voir dire, Mu'Min moved to strike two jurors for cause. On appeal, he contends that the trial court erred in overruling his motions to strike Alexandria Santiago, a prospective alternate, and Gregory Dailey. He argues that Ms. Santiago was not impartial because, he says, she "had patronized Dale City Floors" and referred during voir dire to Mrs. Napwasky "by her first name".

The transcript shows that Ms. Santiago had said that she "knew Gladys", that their relationship had been "friendly", but that "we weren't friends." In reply to questions put by defense

counsel, she affirmed that her contacts with the victim did not "cause [her] to form an opinion", that she was not "aware of any bias or prejudice", and that she was "able to render a fair and impartial verdict and set aside [her] knowledge of Mrs. Napwasky".

Mu'Min challenges the seating of Mr. Dailey on the ground that "his deliberations would [have been] hampered and rushed by the financial hardship caused by jury service in a lengthy case." According to the record before us, Mr. Dailey made no plea of personal financial hardship. Asked what hardship his service on the jury would cause, he said, "I'm doing telephone communications, and the company I work for is very small and it would jeopardize their business right now." This, he believed, could make him feel "rushed" and "could somewhat hamper" his ability as a juror to deliberate.

Under Code § 8.01-341.2, a person's duty to serve on a jury may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." The privilege, one the statute makes available at the discretion of the trial court, is purely personal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer.

We find no merit in these assignments of error. Every question contemplated by Code § 8.01-358 and required by Rule 3A:14 was addressed to these prospective jurors by court and counsel. Every response Santiago and Dailey made fully supports

the trial judge's conclusion that both were qualified to sit on the jury, and we will uphold his rulings.[6]

III. GUILT TRIAL ISSUES

A. Evidentiary Rulings

One of the elements of one of the forms of the offense charged in the indictment was the status of the accused at the time the offense was committed, i.e., that he was then "a prisoner confined in a state or local correctional facility".[7] Code § 18.2-31(c). As proof of Mu'Min's status, the Commonwealth offered in evidence at the guilt trial a copy of

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[6]On brief, Mu'Min also complains generally that "[t]he trial court's voir dire . . . was essentially limited to inquiry whether a juror's views [concerning capital punishment] would prevent, not substantially impair, choosing one punishment or the other." Although the defendant had raised an objection on this ground during voir dire, he failed to object to the seating of any juror on that ground. Applying Rule 5:25 in a similar procedural context, we have refused to consider a challenge to a death-qualifying question. "If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections." Spencer v. Commonwealth, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989). We apply that rule to Mu'Min's complaint.

[7]Defining this term, the trial court instructed the jury as follows:

> An inmate of a state correctional facility remains an inmate at all times until he is released from that status by the proper state authority. An inmate who escapes from custody retains the status of inmate during the entire course of such an unauthorized absence.

This is a correct statement of the law in this Commonwealth. See Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 793-94 (1871); see also Jefferson v. Commonwealth, 214 Va. 747, 752, 204 S.E.2d 258, 262 (1974).

the order of conviction of first degree murder entered against Mu'Min in 1973. In keeping with its ruling against a motion that defense counsel had made in limine, the trial court admitted the order over the defendant's objection. On appeal, the defendant argues that evidence of prior crimes is inevitably prejudicial and that references the Commonwealth's Attorney made in the presence of the jury to the facts disclosed by that order compounded the prejudice. Accordingly, the defendant maintains that the trial court's rulings constituted reversible error. We do not agree.

A transcript of Mu'Min's interview with the investigator in which, eventually, he confessed his assault upon Mrs. Napwasky was read to the jury. As the following excerpt reveals, the defendant initiated several references to his prior conviction and to the sentence imposed.

> WATSON: You tried to wipe off your fingerprints?
>
> MU'MIN: Wipe my fingerprints off.
>
> WATSON: Why did you do that?
>
> MU'MIN: Because I'm a convicted murderer.
>
> * * *
>
> WATSON: Why didn't you come forward with this story earlier?
>
> MU'MIN: Because I'm a convicted murderer.
>
> * * *
>
> MU'MIN: I know what you're -- it's the same thing back in '73 . . . . When I got this murder charge I was sitting home. My aunt and my uncle both in the house, testified that I was home when a shot was fired, but because of certain physical evidence that

they picked up, they had similarities and someone who said that he thought he saw me by the way someone walked, I've been sitting in the penitentiary since this, since this '73 incident, the last 15 years . . . .

* * *

MU'MIN: I mean how can it -- that look, you know, how can that look good for me? I'm a convicted murderer.

WATSON: Think about it.

MU'MIN: Serving a 48 year sentence.

These several references, integral parts of a confession we have found to be voluntary, were competent evidence. See Boggs v. Commonwealth, 229 Va. 501, 517, 331 S.E.2d 407, 419 (1985), cert. denied 475 U.S. 1031 (1986); Bowman v. Commonwealth, 174 Va. 461, 463, 5 S.E.2d 497, 498-99 (1939). We hold, therefore, that error, if any, resulting from the trial court's rulings concerning the 1973 order of conviction was rendered harmless by the defendant's own account of the same facts disclosed by that order. See Schindel v. Commonwealth, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (hearsay error rendered harmless by defendant's "own testimony corroborating the factual details").

Challenging another evidentiary ruling, Mu'Min argues that the trial court erred in excluding from the evidence a copy of a VDOT departmental regulation. The defendant offered the document to show that a VDOT employee assigned to supervise his work crew had not taken an oath as a peace officer as required by the regulation and, hence, that at the time the victim was killed, he was not "a prisoner . . . in the custody of an

employee [of a correctional facility]" within the contemplation of Code § 18.2-31(c).

We need not consider this issue. The jury finding in the language of § 18.2-31(c) was only one of the bases for the guilty verdict. The jury also rested its verdict upon its finding in the language of § 18.2-31(d) that Mu'Min committed the killing "during the commission of robbery while . . . armed with a deadly weapon." Consequently, the issue raised on appeal is moot. Cf. Zant v. Stephens, 462 U.S. 862 (1983) (death penalty upheld although one of three statutory aggravating circumstances subsequently declared invalid); accord Poyner v. Commonwealth, 229 Va. 401, 427, 329 S.E.2d 815, 830, cert. denied, 474 U.S. 888 (1985); Tuggle v. Commonwealth, 230 Va. 99, 110, 334 S.E.2d 838, 845 (1985), cert. denied 478 U.S. 1010 (1986); Stout v. Commonwealth, 237 Va. 126, 134, 376 S.E.2d 288, 292, cert. denied, __ U.S. ___, 109 S.Ct. 3263 (1989).

B. Jury Instructions

The defendant assigns error to the trial judge's rulings refusing four instructions relating to Mu'Min's contention that he was not a prisoner within the intendment of Code § 18.2-31(c) and his ruling granting the Commonwealth's instruction to the contrary (see footnote 5 supra). For the reason just stated, we need not address these assignments of error.

Mu'Min also questions another ruling on another instruction granted by the trial court. Instruction number 1 defined capital murder in terms of the three statutory definitions charged in the indictment and the elements of the

lesser-included offenses of first and second degree murder and voluntary manslaughter. The defendant believes that the instruction defined first degree murder and the standard of proof incorrectly and that the trial court erred in refusing his substitute draft.

In pertinent part, instruction number 1 told the jury that if they failed to find any of the three predicates for capital murder,

> but find that the Commonwealth has proved beyond a reasonable doubt:
>
> (1) That the defendant killed Gladys Napwasky; and
>
> (2) That the killing was malicious; and
>
> (3) That the killing was willful, deliberate and premeditated,
>
> then you shall find him guilty of first degree murder. . . .

We find no error in this instruction. Indeed, we see no material difference between this definition and that of the substitute draft, and we reject the defendant's complaint.

IV. PENALTY TRIAL ISSUES

A. Passion or Prejudice

Whenever the death penalty is imposed, this Court is required to review the record to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor". Code § 17-110.1(C)(1). The defendant claims that the trial court committed error by refusing the jury's request for a definition of the particulars of a life sentence. We disagree. Rejecting

a similar claim in an earlier capital case, we said that the jury's question actually "tends to show that the jury's deliberations were dispassionate, unprejudiced, and guided by earnest consideration of every factor relevant to the portentous decision they were required to make." Delong v. Commonwealth, 234 Va. 357, 370, 362 S.E.2d 669, 676 (1987), cert. denied, 485 U.S. 929 (1988).

The defendant also suggests that the jury's penalty decision was the result of some "other arbitrary factor". The defendant offered in evidence at the penalty trial a copy of a departmental regulation providing that "[a] prisoner . . . shall not be left without supervision at any time." In response to the Commonwealth's objection, the trial judge said, "I question the relevancy . . . ." The defendant urges us to commute the sentence of death on the ground that the judge's comment influenced the jury "to disregard a major component of the defendant's evidence in mitigation."

For two reasons, we decline to do so. First, the transcript shows that the judge's comment was made to the attorneys in a side-bar conference. Having in mind the purpose of such a conference, we think it is unlikely that the comment was heard by the jury. Second, even if the comment was overheard, the trial court's decision to overrule the Commonwealth's objection and admit the document for the jury's consideration cured any prejudice the comment may have caused.

Having conducted a thorough review of the voluminous record of both phases of the trial, we find nothing to show that the

penalty imposed by the jury and confirmed by the trial court was the product of passion, prejudice, or other arbitrary factor.

B. Propriety of the Sentence

As required by Code § 17-110.1(C)(2), we must now determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

1. Excessiveness

A death penalty is inherently excessive unless it is based upon what has come to be known as the "dangerousness predicate" or the "vileness predicate". Code § 19.2-264.4(C) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Tracking the language of the statute as incorporated in the court's instruction number 1, the jury's verdict based the death penalty upon both predicates.

The defendant challenges the jury's finding of the vileness predicate because, he says, the Commonwealth's Attorney failed "to include torture in his bill of particulars" and "the

evidence . . . did not establish torture."[8] We think the evidence of the multiple, grievous wounds inflicted upon Mrs. Napwasky was sufficient to prove torture, see Tuggle v. Commonwealth, 228 Va. 493, 516, 323 S.E.2d 539, 553 (1984), vacated and remanded on other grounds, 471 U.S. 1096 (1985) ("torture" correctly included in vileness instruction where evidence was sufficient to show victim, "[w]hile still alive, . . . was severely bruised and bitten on her breast"). However, it is immaterial that the jury instruction and the jury's verdict contained the word "torture" when the bill of particulars did not. It is immaterial because, as defined in Code §§ 19.2-264.2 and -264.4(C), "the term 'vileness' includes three separate and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death." Bunch v. Commonwealth, 225 Va. 423, 442, 304 S.E.2d 271, 282, cert. denied, 464 U.S. 977 (1983).

The autopsy report identified 16 cuts and puncture wounds on the victim's face, neck, chest, and left arm and numerous blunt-force injuries to the face and forehead. Clearly, the evidence was sufficient to prove an "aggravated battery", i.e., "a battery which, qualitatively and quantitatively, is more

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[8] In another argument advanced on brief, Mu'Min says that "the sentence of death is excessive" because, had the government "exercised rudimentary care in supervision of the defendant, this crime would not have been committed." In effect, the defendant argues that an escapee who commits murder is entitled to immunity from the death penalty for his intrepidity in escaping supervision. We are unpersuaded.

culpable than the minimum necessary to accomplish an act of murder." M. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967 (1979). Indeed, a single stab wound may, under certain circumstances, be sufficient to satisfy this definition. See, e.g., Stout v. Commonwealth, 237 Va. at 132-33, 376 S.E.2d at 291-92; Edmonds v. Commonwealth, 229 Va. 303, 313, 329 S.E.2d 807, 814, cert. denied, 474 U.S. 975 (1985).

In light of the "evidence of the prior history of the defendant [and] of the circumstances surrounding the commission of the offense", Code § 19.2-264.4(C), we think the jury was entirely justified in finding that the defendant "would constitute a continuing serious threat to society", id. We need not recite the details of that evidence. It is enough that we have found proof of the vileness predicate sufficient to support the imposition of the death penalty. "When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence." Tuggle v. Commonwealth, 230 Va. at 110, 334 S.E.2d at 845, quoted with approval in, Stout v. Commonwealth, 237 Va. at 134, 376 S.E.2d at 292.

2. Disproportionality

Code § 17-110.1(C)(2) requires us to compare the case under review with "similar cases" in making our determination whether "the sentence of death is excessive or disproportionate". To

facilitate that comparison as directed in § 17-110.1(E), we have accumulated the records in all capital murder cases to come before this Court (including those in which the penalty imposed was a life sentence) and stored and indexed those records apart from those in all other criminal cases. In selecting cases from that inventory for purposes of our comparison, we give special attention to those in which the death penalty was based upon the same statutory predicate (or predicates) as that underlying the penalty under review.

The cases in which the death penalty was based, as it was here, upon both the "future dangerousness" predicate and the "vileness" predicate are collected and annotated in our recent opinion in Spencer v. Commonwealth, 238 Va. 295, 319-20, 384 S.E.2d 785, 799-800 (1989). See also R. Smith v. Commonwealth, 239 Va. ___, ___ S.E.2d ___ (1990). We have compared the records in those cases with that in the case at bar, and we are satisfied that "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972 (1980).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

By counsel appointed specially, Mu'Min charges that his trial lawyer was ineffective because he failed at the penalty trial to submit certain instructions and to object to several instructions as well as to the verdict form approved by the trial court. These failures, he says, are patently prejudicial and unjustifiable by any acceptable explanation. In Beaver v.

Commonwealth, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033 (1987), we rejected just such a claim.

> Defendant complains of errors of omission committed by his trial counsel. Yet the record contains no testimony from trial counsel concerning his alleged acts of omission. Were we to attempt to dispose of defendant's contentions on this record, we would be called upon to declare the work of an attorney to be ineffective without that attorney having an opportunity to explain his conduct. [citation omitted.]
>
> The defendant argues, however, that though the record does not contain everything that relates to the question of ineffective assistance of counsel, it contains enough to establish that trial counsel failed to do things that obviously should have been done and for which there can be no acceptable explanation. However, [Code § 19.2-317.1] does not say that we can proceed where there is partial evidence of ineffectiveness. The statute presupposes a full record on the very issue that is the basis for the claim of ineffective assistance of counsel. We conclude, therefore, that defendant's claim of ineffective assistance of trial counsel cannot be raised in this appeal.

Id. at 537-38, 352 S.E.2d at 351-52.

Applying the qualifying language of Code § 19.2-317.1,[9] we remain committed to our previous rulings. Trial counsel will not be exposed to the possibility of professional disgrace without "an opportunity to defend himself on the record by

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[9]Code § 19.2-317.1 provides:

> A claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial.

giving the rationale for his challenged acts of omission or commission". Correll v. Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 362, cert. denied, 482 U.S. 931 (1987); accord Frye v. Commonwealth, 231 Va. 370, 400, 345 S.E.2d 267, 287-88 (1986). See R. Smith, 239 Va. at ___ n. 6, ___ S.E.2d at ___ n. 6. Mu'Min's claim of ineffective assistance of counsel cannot be considered in this appeal.

VI. CONCLUSION

Finding no reversible error in the conduct of either phase of the bifurcated trial and no cause to commute the death sentence, we will affirm the judgment confirming the jury's two verdicts.

Affirmed.

Justice Whiting, with whom Justice Stephenson and Justice Hassell join, dissenting.

DAVID MAJID MU'MIN A/K/A
DAVID MICHAEL ALLEN

v. Record No. 890899

COMMONWEALTH OF VIRGINIA

Justice Whiting, with whom Justices Stephenson and Hassell join, dissenting.

I cannot agree that the trial court correctly excluded all of the questions intended for the 16 prospective jurors who said they had acquired pretrial information about the offense. A trial court's assessment of prospective jurors' potential for bias is presumptively correct, Patton v. Yount, 467 U.S. 1025, 1036 (1984); Pope v. Commonwealth, 234 Va. 114, 124, 360 S.E.2d 352, 358 (1987), absent manifest error, Patton, 467 U.S. at 1031-32 n.7; Irvin v. Dowd, 366 U.S. 717, 723 (1961); Pope, 234 Va. at 124, 360 S.E.2d at 358. In this case, however, I believe there was "manifest error" in refusing to permit any of the questions necessary to establish a factual and objective basis for assessing juror impartiality.

The record discloses an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

When the prospective jurors were assembled, 16 of them responded affirmatively to the question of whether they had "acquired any information from the news media or from any other source" regarding the offense. The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> . . . .
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired in this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

Only one prospective juror responded to these inquiries; the balance remained silent. That prospective juror was excused for cause when he said he could not be impartial.

Because of the trial court's ruling, we do not know what the prospective jurors had read or heard about the case before trial. We do know, however, that the following information regarding the accused, not a part of the evidence at the guilt phase of trial, was published in the local papers:

1. His suspected assault upon a fellow prisoner, resulting in a broken nose.

2. His citation for 23 prison violations and his rejection for parole on six previous applications.

3. His 1973 conviction for the murder and robbery of a Grayson County cab driver, with some details of the crime and a statement from the Grayson County prosecutor that the death penalty was not available when the accused was convicted.

4. His juvenile record in New York and Virginia.

5. His alleged commission of a burglary and engagement in "Peeping Tom" activities while a prisoner.

Also, there were indications that a rape may also have been involved in the commission of this murder.

An accused has statutory and constitutional rights to trial by an impartial jury. I do not believe that defense counsel was afforded a meaningful voir dire examination of prospective jurors, as mandated by Code § 8.01-358. The majority disposes of this contention in a footnote (n.3) by relying upon LeVasseur v. Commonwealth, where we said that "[a] party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum." 225 Va. at 581, 304 S.E.2d at 653. Nothing in the record in the present case, however, suggests that defense counsel sought to "propound any question he wishe[d], or to extend voir dire questioning ad infinitum."

Code § 8.01-358 mandates that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . and shall have the right to ask such person . . . directly any relevant question to ascertain

whether he . . . is sensible of any bias or prejudice." The section further provides that "[a] juror, knowing anything relative to a fact in issue, shall disclose the same in open court." Code § 8.01-358. Moreover, as we said in LeVasseur, "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause.'" 225 Va. at 581, 304 S.E.2d at 653.

In enacting Code § 8.01-358, the General Assembly intended to provide counsel a meaningful voir dire examination. Clearly, questions pertaining to what a prospective juror had seen, read, or heard about the case are "relevant . . . to ascertain whether he . . . is sensible of any bias or prejudice." Therefore, the court violated Mu'Min's statutory right to trial by an impartial jury.

Additionally, "[u]nder the Federal and State Constitutions, U.S. Const. amends. VI and XIV; Va. Const. art. 1, § 8, an accused has a right to trial by an 'impartial jury.'" Wm. Patterson v. Commonwealth, 222 Va. 653, 658, 283 S.E.2d 212, 215 (1981). As illustrated by the majority opinion, ___ Va. at ___, we frequently apply federal decisions construing the Sixth Amendment right to an impartial jury in construing this same right under art. 1, § 8 of the Virginia Constitution. See also, Mackall v. Commonwealth, 236 Va. 240, 251, 372 S.E.2d 759, 766 (1988), cert. denied, 109 S. Ct. 3261 (1989).

An accused's right to trial by an impartial jury is violated if jurors are impanelled after an inadequate voir dire examination. See, e.g., Turner v. Murray, 476 U.S. 1 (1986). If the examination is inadequate, the accused's right is prejudiced in two respects; he is unable to exercise effectively his right of challenge, United States v. Dellinger, 472 F.2d 340, 368 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), and the trial court is unable to assess fairly the prospective jurors' impartiality. United States v. Davis, 583 F.2d 190, 197-98 (5th Cir. 1978).

Thus, when there has been unusual pretrial publicity in a criminal case, the Supreme Court has said that there must be "fair support in the record for the state courts' conclusion that the jurors . . . would be impartial." Patton, 467 U.S. at 1038. Moreover, where prospective jurors have indicated that they were exposed to pretrial publicity in response to questions similar to those posed in this case, we have warned: "[T]he proof that [a prospective juror] is impartial and fair, should come from him and not be based on his mere assent to persuasive suggestions." Breeden v. Commonwealth, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (emphasis added) (citations omitted).

In other words, "in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient . . . .'" Silverthorne v. United States, 400

U.S. 627, 638 (9th Cir. 1968) (emphasis added) (citations omitted). In at least two of our cases involving pretrial publicity, we have said that a trial court should have rejected such subjective assurances. Justus v. Commonwealth, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980); Breeden, 217 Va. at 298-300, 227 S.E.2d at 736-37. "[H]owever willing the juror might be to trust himself, the law will not trust him." Breeden, 217 Va. at 298, 227 S.E.2d at 735 (citations omitted).

Accordingly, whether a juror can impartially render a verdict "should not be [based] on that juror's [subjective] assessment of self-righteousness without something more." Silverthorne, 400 F.2d at 639. Instead, a trial court must objectively and independently assess each prospective juror's state of mind.

> When a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality. Instead, the trial court should make this determination.

Jordan v. Lippman, 763 F.2d 1265, 1274 (11th Cir. 1985) (emphasis added) (citation omitted). "The issue of who is, or is not, a competent juror is one for the trial court to decide," Justus, 220 Va. at 976, 266 S.E.2d at 91, not the juror himself.

Furthermore, I believe the questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective

opportunity to assess the demeanor of each prospective juror in disclaiming bias. Moreover, even if the court had required an express affirmation of each prospective juror, such an affirmation would have required an admission of bias or prejudice before the assembled panel. "No doubt each juror was sincere when he said that he would be fair and impartial to the [accused], but the psychological impact requiring such a declaration before one's fellows is often its father." Irvin, 366 U.S. at 728.

Apparently, we have never addressed the necessity of such questions at voir dire, where panel members have been exposed to unusual pretrial publicity. However, we have ample precedent for such questions. In Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974), the trial court sought a description of what was actually remembered by those prospective jurors who had been subjected to pretrial publicity. There, we sustained the trial court's objective findings regarding the impartiality of those prospective jurors, who we noted had remembered few of the details of such publicity. Id. at 717, 204 S.E.2d at 420. Although not the subject of our discussion, an inspection of the appendices in the following cases indicates that "content" questions were likewise asked of prospective jurors exposed to pretrial publicity. Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063 (1984); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938

(1982); Justus, 220 Va. 971, 266 S.E.2d 87; Breeden, 217 Va. 297, 227 S.E.2d 734; Greenfield, 214 Va. 710, 204 S.E.2d 414.

The questions proffered by the accused,[1] and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias.[2] Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware, as in Justus and Breeden. "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equipment v. Greenwood, 464 U.S. 548, 554 (1984).

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[1]The tenor of the proffered questions was: What have you seen, read or heard about this case; from whom did you get this information; when and where did you get this information; have you discussed this case with anyone; with whom; when and where; what did you discuss; if an opinion had been formed, what is it; has anyone expressed an opinion about this case to you; who; what; when; and where?

[2]Without necessarily approving each of the proffered questions, if the trial court permits no questions regarding the source and extent of exposure of pretrial questions, and, therefore, content questions are necessary, at minimum, I believe each prospective juror subjected to pretrial publicity should have been asked what information he recalled and when it was received. Moreover, the risk of "tainting" the other prospective jurors could have been minimized by excluding the others from the courtroom during each examination, or by examining them in smaller groups, as the court did.

I believe that the majority's citation of United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), for the proposition that the opportunity to ask "content questions" is "not a matter of right," misconstrues the essence of that holding. The Haldeman Court explicitly agreed that a certain ABA Standard "mandate[d] an inquiry into the sources and intensity of a venireman's exposure to pretrial publicity, not an inquiry into his recollection of the content of that publicity." Id., at 69 (emphasis added). Moreover, emphasizing that the voir dire in that defendant's case permitted counsel to determine the nature and intensity of the exposure to pretrial publicity, the Court stated:

> We agree that it would have been reversible error for the Court to accept jurors simply because they said they would be fair . . . . In this case, however, the Court had before it and acted on not only the jurors' subjective assurances but also objective information relating how closely they had followed Watergate and their sources of information.

Id., at 67 n.51 (citations omitted) (emphasis added). In addition, Haldeman distinguished Dellinger and Silverthorne, two cases involving constitutionally inadequate voir dire, on the ground that the trial courts in those cases failed to permit any questions concerning the source and intensity of exposure to pretrial publicity. See id. at 69.

As in Dellinger and Silverthorne, the trial court in this case rejected all voir dire questions aimed at determining the source and intensity of exposure to pretrial publicity, as well as "content" questions. In my view, it

was not necessarily error to preclude some or even all of the "content" questions; however, the trial court's conduct of voir dire was constitutionally inadequate, even under Haldeman, in its blanket refusal to permit any questions aimed at determining the sources and intensity of exposure to pretrial publicity (e.g., where did you hear about this case; how many times did you hear about it; and when did you hear about it).

In my opinion, under the circumstances of this case, the refusal to permit any questions regarding the source and intensity of knowledge regarding pretrial publicity violated the accused's statutory and constitutional right to trial by an impartial jury. Although I agree with the majority opinion in all other respects, I would reverse the judgment of the trial court and remand the case for a new trial at which appropriate voir dire questions should be asked.

Supreme Court, U.S.
FILED
AUG 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5193

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The
Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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III. WHETHER PETITIONER'S CLAIM CONCERNING ADMISSIBILITY OF EVIDENCE OF ANOTHER CRIME RAISES A FEDERAL ISSUE.

IV. WHETHER PETITIONER'S VOLUNTARINESS CLAIM WARRANTS CERTIORARI REVIEW.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published opinion reported as Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990). A copy of the opinion is attached to the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition at pages 1-3.

Rule 10.1 of the Rules of the Supreme Court of the United States provides in pertinent part that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor."

STATEMENT OF THE CASE

On April 20, 1989 a jury in the Circuit Court of Prince William County convicted Dawud Majid Mu'Min of capital murder. On April 24, 1989, after a sentencing hearing, the jury fixed his punishment at death. The trial court entered final judgment on June 12, 1989, imposing the penalty fixed by the jury.

An automatic appeal was taken to the Supreme Court of Virginia, which affirmed the judgment and sentence on March 2, 1990. Petitioner's petition to set aside the judgment and grant a rehearing was denied on April 20, 1990.

STATEMENT OF FACTS[1]

On September 22, 1988 the defendant was an inmate at Virginia's Haymarket Correctional Unit serving a forty-eight (48) year sentence for a 1973 first degree murder conviction. (Tr. 4/17/89 at 97, 99). That morning, Mu'Min and five other inmates

---

[1]These facts are derived from Virginia Supreme Court Opinion, 239 Va. at 437-438, 389 S.E.2d at 889-890.

were transported to the Department of Transportation's "Dale City Headquarters" as part of their work assignment. (Tr. 4/17/89 at 99, 193, 195). There "they were put to work ... basically painting equipment, working on equipment." (Tr. 4/17/89 at 195). Late that morning the defendant was seen "grinding" a metal spike on one of the grinders in the "shop." (Tr. 4/18/89 at 177-179).

Around noon, the defendant "walk[ed] away ... in a suspicious type manner" down a pathway "around the highway department's salt dome." (Tr. 4/18/89 at 180, 221). The defendant then went over a perimeter fence and headed along Interstate 95 in the direction of the Ashdale Plaza shopping center, located approximately one mile away. (Tr. 4/18/89 at 222; Tr. 4/19/89 at 25, 42-43, 116, 280).

When Mu'Min arrived at the shopping center he entered Dale City Floors, a retail carpet and flooring store, and repeatedly attacked the owner, Gladys Nopwasky, with a "sharp instrument." (Tr. 4/17/89 at 19-20, 224-244; 4/18/89 at 284; 4/19/89 at 11-15). He took all of the money from the desk drawer near the victim's body, amounting to approximately four dollars; "tried to ... wipe [his] fingerprints off" "everything that [he had] touched;" and then returned to his prison work crew at the highway department. (Tr. 4/19/89 at 50, 96-97, 154-155, 310; 4/20/89 at 31, 46).

A few minutes after the attack, a customer discovered the victim's body on the floor in the back of the store:

> [S]he had no clothes on from the waist down and her face was bloodied and the entire area was completely -- well, there was papers strewn everywhere and blood everywhere. And her face was so badly beaten or whatever that she would have been unrecognizable.

(Tr. 4/17/89 at 264).

The customer called the rescue squad, which arrived a few minutes later. (Tr. 4/17/89 at 265, 272). The paramedic found the victim "laying [sic] face up on her back on the floor in a pool of blood that was around her head and upper body;" she was unclothed below the waist and her blouse and brassiere had been pulled up, exposing her breasts. (Tr. 4/17/89 at 273, 282). The contents of her wallet had been "scattered on the floor." (Tr. 4/17/89 at 274). The victim "was breathless and pulseless," but the "EKG machine showed an electrical rhythm," indicating that her heart was functional but there was no blood for it to pump. (Tr. 4/17/89 at 276-277).

The autopsy revealed that the victim's face, neck, chest and left arm had been stabbed or cut sixteen times with a sharp instrument. (Tr. 4/18/89 at 13-25). Two of these wounds, one "on the lower neck" and the other "on the left upper chest," were fatal. (Tr. 4/18/89 at 25). The one to the lower neck was three inches deep and severed the jugular vein. (Tr. 4/18/89 at 22). The one to the left upper chest penetrated four inches, "injured the pulmonary artery," "went into the left chest cavity" and injured the left lung. (Tr. 4/18/89 at 14, 24). The autopsy also revealed that the victim had suffered numerous "blunt-force trauma injuries," consistent with blows from a fist, causing a laceration on her forehead and bruises over a large portion of her face. (Tr. 4/18/89 at 13, 17, 18, 24).

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER'S CLAIM CONCERNING THE SCOPE OF VOIR DIRE DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that he was denied his right to an impartial jury by the trial court's refusal to permit questioning of prospective jurors about what they had heard or read about the case. The trial court, however, directed several questions to the jurors to determine whether they had received any information about the case and, if so, whether it would affect their impartiality:

> THE COURT: Have any of you acquired any information about ... the alleged offense, or the accused from the news media or from any other source?
>
> * * *
>
> THE COURT: ... Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> * * *
>
> THE COURT: Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> * * *
>
> THE COURT: I'll repeat it in a different fashion.
>
> In view of everything that you've seen, heard or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not ... enter the Jury Box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(Tr. 4/17/89 at 16, 18-19).

Other questions posed by the court also would have revealed any disqualifying effects from exposure to pre-trial publicity:

> THE COURT: Are any of you sensible to any bias or prejudice against either the Commonwealth or the accused?
>
> * * *
>
> THE COURT: ... Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

(Tr. 4/17/89 at 13, 19).

Furthermore, defense counsel was permitted to ask additional questions on this issue. In fact, the trial court had to prompt defense counsel to ask questions concerning pre-trial publicity.

> THE COURT: ... Next question.
>
> MS. ROLLISON [DEFENSE COUNSEL]: Nothing further.
>
> THE COURT: Excuse me. That's not all. I'll pick them up for you. You're missing one about the --
>
> MS. ROLLISON: That's correct, Your Honor.
>
> THE COURT: All right. Go ahead.
>
> MS. ROLLISON: Have you discussed this case -- we did ask that one, Your Honor.
>
> THE COURT: But I am not sure that some of these persons may not have read something about it. I'll give you an opportunity.
>
> Have any of you read anything in the newspaper concerning this case at all?
>
> MR. TAYLOR: (Indicating).
>
> MR. SMITH: (Indicating).
>
> MS. HAINES: (Indicating).
>
> THE COURT: Now go with that.

MS. ROLLISON: On the basis of what you've read in the newspapers, have you reached an opinion in this matter?

THE JURY PANEL: (Shaking heads).

MS. ROLLISON: Are any of you sensible to any bias or prejudice after what you've read in the papers in this case?

THE JURY PANEL: (No response).

MS. ROLLISON: Would all of you be able to reach a fair and impartial verdict after reading what you've read in the papers?

* * *

THE COURT: All right. Are you satisfied, Ms. Rollison?

MS. ROLLISON: Yes, Your Honor.

(Tr. 4/17/89 at 81-83).

Similarly, defense counsel was permitted to ask questions concerning information the jurors may have heard from others about the case, as demonstrated by the extensive questioning of Juror Walters on this issue:

MS. ROLLISON [DEFENSE COUNSEL]: Have you discussed this case with anyone?

MS. WALTERS: I discussed it with my Lieutenant. She lived on the same block as the victim.

MS. ROLLISON: The fact that you discussed this case with your Lieutenant, has that caused you to have an opinion in this matter?

MS. WALTERS: No.

MS. ROLLISON: Are you sensible of any bias or prejudice because of that discussion?

MS. WALTERS: Not consciously.

MS. ROLLISON: But maybe unconsciously?

MS. WALTERS: (Nodding head).

MS. ROLLISON: Would you be able to listen to the law and the evidence as presented here today, and would you be able to follow that in light of your discussion with your Lieutenant in order to deliver a fair and impartial verdict in this matter?

MS. WALTERS: I think so.

MS. ROLLISON: So you think you would be able to control your unconscious?

MS. WALTERS: Well, I would hope so. I would try to --

* * *

THE COURT: I need to be a little more specific.

You've said you're not conscious of it, you're not sure, and those sorts of things?

MS. WALTERS: I find that very hard to say, what you can keep coming in and out of your mind on what you've had in past discussions with someone.

THE COURT: I guess it comes down to this question for you, Ms. Rollison. I'm looking right at the one that's been approved.

Considering what you've heard in your discussions in that case with your Lieutenant who lived on the street with the lady that was killed, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of this accused?

MS. WALTERS: Yes, I think so.

THE COURT: Is there any question in your mind about it?

MS. WALTERS: No, sir. There's no question in my mind about it.

THE COURT: Let me say this. The Jury is going to be given -- that is the ultimate Jury is going to be given an oath to try the case based upon the law and the evidence.

The law, as I said, is what I have to tell you is the law. The evidence will be what you hear. And that oath is going to be taken, so you'll be bound by that oath if you're a Juror.

With that in mind, can you reach a fair and impartial verdict based upon the law and the evidence?

MS. WALTERS: Yes, sir.

THE COURT: Are you sensible of any bias or prejudice as a result of having discussed this with a neighbor who I presume must have known the lady that was killed?

MS. WALTERS: Not as a good friend but knew who she was, yes.

THE COURT: Are you sensible of any bias or prejudice as a result of that?

MS. WALTERS: No, sir.

THE COURT: All right. Go ahead, Ms. Rollison.

MS. ROLLISON: Mrs. Walters, you indicated that you were the only one of the four of you that has discussed this case with anyone else.

Did they express an opinion to you?

MS. WALTERS: No. It was just a case of she was very sorry this happened, and she knew the person.

MS. ROLLISON: Thank you.

(Tr. 4/17/89 at 69-72).

Thus, the full voir dire of the jurors amply demonstrates that they were sufficiently questioned to determine their impartiality.

Of the sixteen jurors who had previously heard something about the case, only juror Syphrett had formed any opinion as to the petitioner's guilt or innocence, and he was excluded for that reason. (Tr. 4/17/89 at 18-21). Of course, even the existence of "preconceived notion[s] of the guilt or innocence of an

accused" based upon pre-trial publicity, is not the test for suitability for jury service. Irvin v. Dowd, 366 U.S. 717, 722-723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id. The jurors in question, however, had not even formed any such opinions which had to be set aside. (Tr. 4/17/89 at 19). Thus, nothing that they had heard about the case could possibly have left a disqualifying impression upon them. Moreover, as demonstrated, all the jurors who were seated on the panel of 20 indicated that nothing that they had heard about the case would affect their impartiality and that they could "enter the Jury box with an open mind." (Tr. 4/17/89 at 18-19).

The issue of juror impartiality is essentially a fact-bound question, Wainwright v. Witt, 469 U.S. 412 (1985), and in this case both the trial judge and the Virginia Supreme Court have found that the jurors who sat on petitioner's case were impartial. These factual determinations are entitled to great deference, even on direct appeal. Witt, 469 U.S. at 428-429.

Moreover, the constitutional standards regarding the scope of voir dire are clearly established. See Ristaino v. Ross, 424 U.S. 589 (1976); Turner v. Murray, 476 U.S. 28 (1986). This Court has repeatedly recognized that the primary responsibility for impaneling an impartial jury is the trial judge's and that the scope of voir dire is largely within the judge's discretion. Ristaino, 424 U.S. at 598; Turner, 476 U.S. at ___, 106 S.Ct. at 1689 n. 12. Petitioner's claim is nothing more than

that the trial judge and the Virginia Supreme Court erred in applying that standard in his case. This Court, however, does not grant certiorari merely to review claims of perceived error. Ross v. Moffitt, 417 U.S. 600, 617 (1974). Petitioner has shown no "special and important reason" which would warrant certiorari review of this claim. Rule 10.1.

II. PETITIONER'S CLAIM RE THE IMPARTIALITY OF CERTAIN JURORS DOES NOT WARRANT CERTIORARI REVIEW.

"The partiality or impartiality of an individual juror is a factual issue best determined by the trial court." Patton v. Yount, 467 U.S. 1025 (1984) ("whether jurors have opinions which disqualify them" is not a mixed question of law and fact but solely a fa ual question). Great deference is paid to the trial court's resolution of such questions, even on direct appeal. Witt, 469 U.S. at 428-429.

The applicable constitutional standards regarding juror impartiality are thus abundantly clear and nothing could be gained by granting certiorari in this case. This Court does not grant certiorari merely to review perceived errors. Ross v. Moffit, 417 U.S. at 617. Petitioner has shown no special or important reason. Rule 10.1.

III. THE ADMISSION OF EVIDENCE OF OTHER CRIMES DOES NOT RAISE A FEDERAL ISSUE.

The petitioner contends that the trial court erred in admitting evidence of the nature of the crime for which he was imprisoned when he committed the instant offense. This contention is without merit because the petitioner's prior

conviction was relevant proof of an element of his capital offense. Moreover, the claim clearly fails to state a federal issue.

One of the grounds for the capital murder indictment was that Mu'Min committed the murder "while ... [he] was a prisoner in a state or local correctional facility or while in the custody of an employee thereof." See Va. Code § 18.2-31(c). In order to prove the defendant's status as a prisoner under this theory, it was certainly relevant for the Commonwealth to introduce the conviction order which made Mu'Min a lawful prisoner of the state.

The admissibility of evidence is a question of state law. Moore v. Illinois, 408 U.S. 786 (1972). More particularly, admissibility of evidence of another crime to prove an el. ent of a capital offense does not raise a federal issue. Stockton v. Commonwealth, 852 F.2d 740, 748 (4th Cir. 1988). This Court cannot grant certiorari to review a matter which is governed by Virginia law. See also United States v. Dowling, ___ U.S. ___, 110 S.Ct. 668, 674 (1990) (evidence of other crimes does not violate Constitution).

IV. PETITIONER'S VOLUNTARINESS CLAIM DOES NOT WARRANT CERTIORARI REVIEW.

Petitioner contends that his statements to Investigator Watson on September 30, 1988 and on October 1, 1988 were involuntary.

The test for voluntariness of a confession, of course, is well established. See Miller v. Fenton, 474 U.S. 104, 117 (1985). The trial court's resolution of all factual issues surrounding a confession is binding on appeal. Id. Both the trial court and the Virginia Supreme Court, 239 Va. at 441, 389 S.E.2d at 891, resolved all of the facts against petitioner and found that his confession was voluntary. This conclusion is clearly supported by the record and therefore is binding on this Court.

The "totality of the circumstances" in the present case, includes the facts that the defendant had graduated from a private "prep" school, had received a college degree in business administration, and spoke four languages, including English as his "native" language. (Tr. 1/30/89 at 34-35, 44). He had had prior experience with the criminal justice system including the 1973 first degree murder conviction for which he was imprisoned at the time of the present offense.

Investigator Watson was the only person who questioned the defendant on both occasions. (Tr. 1/30/89 at 21, 24). The conversations did not take place at an "unusual" hour (3:45 p.m. and 7:45 p.m.). (Tr. 1/30/89 at 21, 23). Both times, as evidenced by the tape recording of this conversation, Watson fully advised Mu'Min of his Miranda rights, and both times Mu'Min waived those rights. (Tr. 1/30/89 at 21-23, 25-26). There was nothing "unusual" about Mu'Min's condition, he was "[c]oherent, sober, awake," and "seemed to understand everything that [Watson] said to him." (Tr. 1/30/89 at 23). Watson did not "promise him

anything or threaten him in any way in return for his statement." (Tr. 1/30/89 at 23).

Petitioner also conceded the voluntariness of his confession when he testified at the pretrial suppression hearing:

> Q. [PROSECUTOR]: Now Investigator Watson told you he had a microphone there and he told you this is a Miranda form, he says here, "You have the right to remain silent;" did he not?
>
> A. [MU'MIN]: Yes, he did.
>
> Q. And he said, "Do you understand that?"
>
> A. Yes.
>
> Q. And your reply was what?
>
> A. Yes.
>
> Q. Was that a lie?
>
> A. No, that's no lie.
>
> Q. You told the truth.
>
> He also told you, "Anything you can say can and will be used against you in court," and he said, "Do you understand that?"
>
> Do you recall your reply?
>
> A. Yes, I do.
>
> Q. And that was yes; was it not?
>
> A. Yes.
>
> Q. He said, "You have the right to consult with a lawyer before answering any questions and to have a lawyer with you during any questioning; do you understand that?"
>
> A. Yes.
>
> Q. And that was correct, you understood it?
>
> A. Yes, I understood it.

Q. And, "If you cannot afford a lawyer one will be provided to you free of cost if you want one; do you understand that?"

Your reply was yes, is that right?

A. Yes.

Q. And, "Do you understand your rights as I have explained them?" And your answer was yes, is that right?

A. That's right.

Q. And he also said, "Are you willing to talk with me without consulting a lawyer or having a lawyer present with you?" And your reply was yes, isn't that right?

A. Yes, it was.

Q. So ... you were able to understand what he said to you in plain English; is that correct?

A. Yes, sir.

* * *

Q. And the words that he gave you here, there's nothing in there that you didn't understand and there's nothing in there to indicate that he in any way made you say yes; isn't that correct?

A. That's correct.

* * *

Q. ... [Y]ou know lawyers are there for your benefit if you want them; isn't that right?

A. Yes.

* * *

Q. ... [O]n these occasions you had your right to a lawyer and you wanted to go ahead without one?

A. Yes, I did.

(Tr. 1/30/89 at 35-37, 39-40).

V. THE VIRGINIA STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY SUFFICIENTLY BRIDLES THE JURY'S DISCRETION.

Section 19.2-264.2 "bridles" the sentencer in requiring that either "vileness" or "future dangerousness" be found beyond a reasonable doubt. It also does so at the guilt phase by narrowly defining capital murder. Virginia Code § 18.2-31. See Lowenfield v. Phelps, 482 U.S. 231, 244-246 (1988). No further narrowing is required. Nevertheless, the Virginia Supreme Court clearly accomplishes the constitutionally required narrowing function when it reviews every death sentence, including petitioner's, 239 Va. at 449-451, 389 S.E.2d at 896-898, and applies a narrowing construction to both the vileness and future dangerousness factors. See Virginia Code § 17-110.1. Both reviews were made by the Virginia Supreme Court. 239 Va. at 449-451, 389 S.E.2d at 896-898. The Court of Appeals for the Fourth Circuit, which is intimately familiar with Virginia law, has repeatedly upheld the constitutionality of Virginia's death penalty statute. See e.g. Boggs v. Bair, 892 F.2d 1193, 1196-1198, cert. denied, 110 S.Ct. 2193 (1990).

VI. THE SENTENCE WAS NOT THE RESULT OF PASSION, PREJUDICE, OR OTHER ARBITRARY FACTORS.

The Supreme Court of Virginia, as mandated by § 17-110.1 (C)(1), reviewed the record for the influence of passion, prejudice or any other arbitrary factor. 239 Va. at 448-449, 389 S.E.2d at 896. It found none, and the record reflects none. This Court has recently held that it will not look behind such

good faith reviews of death sentences by a state's highest court. See Walton v. Arizona, ___ U.S. ___, 110 S.Ct. ___ (No. 88-7351, June 27, 1990).

CONCLUSION

A writ of certiorari is not a matter of right, but of judicial discretion. It will be "granted only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. Petitioner has failed to raise any claim which has any significance beyond the parameters of his case. Under these circumstances, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

By: Thomas C. Daniel
Thomas C. Daniel
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
Commonwealth of Virginia
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Thomas C. Daniel, a member of the Bar of this Court and counsel of record for respondent, hereby certify that I have this 16th day of August, 1990, served this Brief upon the petitioner by causing three copies of such document to be mailed first-class mail, with postage prepaid, to Dawud Majid Mu'Min, No. 101387, Post Office Box 500, Mecklenburg Correctional Center, Boydton, Virginia 23917.

Thomas C. Daniel
Assistant Attorney General
Criminal Litigation Section

Mary Sue Terry
Attorney General

H. Lane Kneedler
Chief Deputy Attorney General

Deborah Love-Bryant
Chief-of-Staff

COMMONWEALTH of VIRGINIA

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Gail Starling Marshall
Deputy Attorney General
Judicial Affairs Division

Stephen D. Rosenthal
Deputy Attorney General
Criminal Law Enforcement Division

August 16, 1990

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The Honorable Joseph F. Spaniol, Clerk
United States Supreme Court
One First Street, N.W.
Supreme Court Building
Washington, D.C. 20543

Re: Dawud Majid Mu'Min v. Commonwealth of Virginia
Record No. 90-5193

Dear Mr. Spaniol:

Please find enclosed an original and eleven copies of the Respondent's Brief in Opposition, to be filed with the other papers in the above-referenced case.

Thank you for your consideration in this matter.

Very truly yours,

Thomas C. Daniel
Assistant Attorney General
Criminal Litigation Section

3:50/234

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 1990, a true copy of the foregoing Motion for Leaving to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed on Writ of Certiorari In Forma Pauperis, and Petition for Writ of Certiorari to the Supreme Court of Virginia, all of which are being filed pro se, were mailed to the Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, One First Street, Northeast, Washington, DC 20543, and to the Honorable Mary Sue Terry, Attorney General of Virginia, 101 North Eighth Street, Richmond, Virginia 23219.

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RECEIVED
JUL 18 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

July 17, 1990

The Honorable Joseph F. Spaniol, Jr., Clerk
The Supreme Court of the United States
One First Street, Northeast
Washington, DC 20543

PRO SE

RE: DAWUD MU'MIN vs. CCOMMONWEALTH OF VIRGINIA

Dear Mr. Spaniol:

I am inmate counsel at Mecklenburg Correcitonal Center, Boydton, Virginia, appointed pursuant to Section 53.1-40 of the Code of Virginia.

The above named individual, Dawud Mu'Min, is hereby filing a Motion for Leave to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed on Writ of Certiorari In Forma Pauperis, and a Petition for Writ of Certiorari to the Supreme Court of Virginia, all of which are being filed pro se.

Also enclosed you will find a copy of an order by the Supreme Court of Virginia dated April 20, 1990, denying a Petition for Rehearing.

I am today filing a copy of the motion, the affidavit, and the petition with the Honorable Mary Sue Terry Attorney General of the Commonwealth of Virginia in Richmond, Virginia.

Thank you very much.

Sincerely yours,

Harry S. Montgomery

bg

Enclosures

Supreme Court, U.S.
FILED
NOV 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAWUD MAJID MU'MIN,
Petitioner,

v.

VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 18, 1990
CERTIORARI GRANTED OCTOBER 9, 1990

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CHRONOLOGY OF RELEVANT EVENTS

DATE	PROCCEDINGS
September 22, 1988	Gladys Nopwasky is killed in Prince William County, Virginia
October 3, 1988	Petitioner is arrested for the murder of Ms. Nopwasky
October 3, 1988	Petitioner is indicted for capital murder
April 14, 1989	Trial Judge denies petitioner's motions for individualized voir dire and refuses to ask questions regarding what the members of the venire had seen, heard or read about the offense or petitioner's case
April 17, 1989	Petitioner's trial commences in Prince William County
April 20, 1989	Petitioner convicted of capital murder
April 24, 1989	Jury recommends death sentence
June 12, 1989	Trial Judge sentences petitioner to death
March 2, 1990	Virginia Supreme Court affirms petitioner's conviction and sentence of death
April 20, 1990	Virginia Supreme Court denies petition for rehearing

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY, VIRGINIA

Criminal No. 23103

VIRGINIA

v.

DAWUD MAJID MU'MIN,
Defendant

PETITIONER'S PROPOSED VOIR DIRE QUESTIONS

1. Is anyone acquainted with the victim, Gladys Nopwasky, her husband, or any member of her family?
2. Has anyone ever been employed by, or had any other connection with, the victim's business, Dale City F'loors in Ashdale Plaza on Dale Boulevard in Dale City, Virginia?
3. Does anyone have family or friends who were ever employed by or had a connection with the victim's business, Dale City Floors?
4. Has anyone patronized Dale City Floors?
5. Do any of you live within a mile of Ashdale Plaza?
6. Are any of you related to or acquainted with any of the prosecutors or Commonwealth's Attorneys for Prince William County, and in particular with Mssrs. Paul Ebert or William Ryland?
7. Did any of you participate in or contribute to any of the election campaigns of Mr. Paul Ebert for Commonwealth's Attorney?

8. Did any of you attend any campaign meetings or rallies in his behalf?
9. Is anyone related to or acquainted with Mr. David Mabie?
10. Are any of you related to or acquainted with any of the following individuals, who may be called as witnesses by the prosecutor in this case:

10a. Do any of you have law enforcement officers as friends or neighbors?

10b. Do any of you hold jobs with the highway department?

10c. Have any of you held such a job in the past?

10d. Do any of you have family or friends who hold, or used to hold jobs with the highway department?

10e. Do any of you hold jobs with a department of corrections, or jail or prison?

10f. Have any of you held such a job in the past?

10g. Do you have family or friends that hold, or used to hold jobs with a department of corrections, jail or prison?

11. Do any of you now hold a law enforcement job?
12. Have any of you held such a job in the past?
13. Do any of you have family or friends who hold, or used to hold law enforcement jobs?
14. Do any of you believe that the testimony of a police officer or investigator carries more weight than the testimony of an ordinary citizen witness?
18. Have any of you appeared as a witness for the prosecution in a criminal case?
19. Have any of you served on a jury before?

20. Have any of you served on a jury in a criminal case?

21. Have any of you served as foreman of a jury?

22. Were any of you acquainted with one another prior to appearing in court today?

23. Have any of you been victims of crime?

24. Do any of you have family members who have been victims of crime?

25. Do any of you have friends or neighbors who have been victims of violent crimes, such as rape, robbery, murder or assault and battery?

28. Have any of you been the victim of a racial incident involving a black person?

29. In this case the defendant is black. The victim was a white female. She was found nude from the waist down. Do any of you believe that your deliberations might be affected by these facts, so as to create any bias or prejudice?

30. Are any of you opposed to the Islamic religion?

31. Section 8.01-358 of the Code of Virginia laws requires that a juror, knowing anything relative to the facts of a case, shall disclose what he or she knows in open court.

    Have you acquired any information about this case, from the newspapers, television, conversations or any other source?

32. What have you seen, read or heard about this case?

33. From whom or what did you get this information?

34. When and where did you get this information?

35. Have you discussed this case with anyone?

36. With whom?

37. When and where?

38. What did you discuss?

39. Have you formed an opinion or conclusion about this case?

40. What is it?

41. Has anyone expressed any opinion about this case to you?

    Can you disregard anything that might have been said and try this case on the law and the evidence you hear in this Court Room?

43. Do you have any opinion or view as to the death penalty, either for it or against it?

44. What is that opinion or view?

45. Is that a view you hold strongly?

46. How long have you held that opinion?

47. Would your opinion or views in favor of the death penalty have any effect on your choice between death and life in prison as punishment in an appropriate case?

47a. What does a life sentence mean to you?

47b. Do any of you believe that the decision on whether or not to impose the death penalty should be made just on the facts of the murder itself, and that mercy should have nothing to do with it?

47c. Do any of you believe that the decision on whether or not to impose the death penalty should be made just on the facts of the murder itself, and the jury should not consider the defendant's history or special circumstances?

47d. In choosing between death and life in prison as punishment in a capital murder case such as this, would you be willing to consider evidence that at the time of the murder the defendant was a state prisoner and the people charged with his supervision should not have allowed him to be at the scene of the crime?

48. In this case the defendant is charged with willful, deliberate and premeditated killing of a person in the commission of robbery while armed with a deadly weapon. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

49. Is that a view you hold strongly?

50. Would it be hard for someone to change your mind?

51. In this case the defendant is charged with the willful, deliberate and premeditated killing of a person in the commission of, or subsequent to, rape. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

52. Is that a view you hold strongly?

53. Would it be hard for someone to change your mind?

54. In this case the defendant is charged with the willful, deliberate and premeditated killing of a person by a prisoner confined in a state or local correctional facility or while in the custody of an employee thereof. If he were found guilty of that charge beyond a reasonable doubt, do you believe that death is the only appropriate punishment?

55. Is that a view you hold strongly?

56. Would it be hard for someone to change your mind?

57. In the event a defendant is convicted of capital murder, i.e., a murder punishable by death or life in prison, and in the event it is proven beyond a reasonable doubt that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or an aggravated battery to the victim, do you believe that the only appropriate punishment for such a defendant is death?

58. In the event a defendant is convicted of capital murder, i.e., murder punishable by death or life in prison, and in the event it is proven beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society, do you believe that the only appropriate punishment for such a defendant is death?

IN THE CIRCUIT COURT OF
PRINCE WILLIAM COUNTY, VIRGINIA

(Caption Omitted in Printing)

EXCERPTS FROM PRE-TRIAL MOTIONS HEARING

[7] Mr. Mu'Min is asking today for a change of venire or a change of venue. If the change of venire is not granted then we would proceed with the change of venue.

My reasoning for both of the changes will be done as one thing rather than arguing both. And I do this in accordance with Rudd versus Commonwealth that says you have to do a change of venire first and then a change of venue second.

I am going to present the Court with some copies of publications up until the day this motion was filed.

We bring this motion sort of in a different time than most. Just to point out the uniqueness of this case.

Most criminal cases have publicity when the accused is arrested and that type of thing. And then they have another set of publicity further on down the road near the trial.

This case is unique in the fact that it's had publicity almost all throughout from the time of arrest on [8] through today.

We are averaging not quite one article a day in reference to this case. I mean obviously they don't come out one a day but when you take them in toto they come out to almost one article a day.

I'm going to be drawing the Court's attention to several of the articles.

THE COURT: Are most of those articles, I have just leafed through what you've given me, it appears most of them appear in the Potomac News.

MS. ROLLISON: Most of them are in the Potomac News, the Prince William Journal, the Weekly Messenger, the Washington Post.

THE COURT: The Prince William Journal is a paper that is throw away that is put in everybody's mailbox?

MS. ROLLISON: No, sir. That's a new newspaper that's come out. It's published, I believe, once a week.

THE COURT: It must be a throw away because I get one of them but I've never bought one.

MS. ROLLISON: I believe the Weekly Messenger is a pass out.

[9] THE COURT: All right.

MS. ROLLISON: In any case, most of the local papers including the Post that covers this local area. And by talking to Mr. Ryland, they are prepared to stipulate to enter these articles.

THE COURT: Any objection to these articles?

MR. EBERT: No, Your Honor.

THE COURT: The articles will come in toto as Defense Exhibit Number 1.

(The document referred to above was marked Defense Exhibit No. 1, for identification and was received in evidence.)

MS. ROLLISON: Taking all these articles individually you don't come up with much but taking them all together you come up with a pervasive feeling of the guilt of Mr. Mu'Min prior to his being found guilty by a jury.

There are several instances of "Mu'Min confesses" or "the defendant having confessed to this crime."

Well, the defendant has never confessed to this crime. He's merely made several statements to people, he's never confessed to kililng Mrs. Nopwasky.

I suggest that printing confessions or saying [10] that the defendant confessed is contrary to law and is a good reason for changing of venire or venue.

It prejudices a possible juror. They expect to hear that the defendant admitted all and in reality the defendant did not admit all. This is in accordance with Grodeau versus Louisiana, 373 US 723.

Several of the articles contain political opinions, it seems that this case came up when everybody was running for office and a lot of our local officials commented on this case in the paper.

And I direct the Court's attention to November 3, 1988, Potomac News opinion by David Brickley on whether inmates should be allowed to work in local areas.

Ms. Watts had a lot to say on this case on various occasions. 10/4/88 in the Potomac News, 10/5/88 in the Weekly Messenger and several other places.

Some of our elected officials, namely Stan Parris and David Brickley, when they were running for the congressional seat in this area issued statements concerning this case.

I think that was detrimental to the defendant. They have no way of knowing whether he is innocent or not. [11] They just presumed he was guilty and publicized their opinions about this case.

Marshall versus US at 360 US 310, 1959 says that "the prior record of an accused should not be released in the paper." Well, just about every article that I have handed the Court today contains a brief summary of Mr. Mu'Min's prior offenses, namely the murder that occurred in 1973.

I think this is also very prejudicial to him and is a good reason for change of venire or venue.

This case is unique in that it has changed a statewide policy. Governor Baliles through Vivian Watts changed the entire furlough program because of this case.

Since that occurred, and they took steps to—well, first of all they banned all prisoners on work crews and now recently I believe they are letting them go back to work in rural areas.

However, several bills have been introduced in the general assembly this year, one by David Brickley, asking to change some of the criteria that they use to set people out on work release crews. Solely because of the impetus of this case.

At this point in time I'm going to call [12] Officer Mike Wolverton to the stand.

THE COURT: Wait just a second.

That's in the way of an opening statement. Do you have anything you want to say, Mr. Ebert?

MR. EBERT: Yes, Your Honor. I don't necessarily, I guess, short of argument, proceed into evidence here, I guess.

THE COURT: It's in the way of an opening statement as far as I was concerned. She made quite a lengthy statement and then wants to call witnesses. I think it's incumbent upon me to let you have an opportunity to respond.

MR. EBERT: If it please the Court, I think there is no evidence before this Court, particularly in these articles that are any different than any other case that gets widespread publicity.

The Court of Appeals, the Supreme Court has consistently considered these capital murder cases. This issue is raised time and time again and unless there is a showing to the Court that there will be some prejudice to a jury and a fair and impartial jury cannot be selected, why the motion is not well taken. The burden being on the defendant to show that he or she cannot get a fair trial.

[13] The statements made about the so-called confession, to my way of thinking I'd call it a confession, but there's nothing in any of these articles I think that's not factual.

Counsel has alluded to political opinions, they are not necessarily talking about this case, this case may have been an impetus for someone to have a political opinion about it and just in policy but this is not the only case

that people mentioned in regard to the policy of the Department of Corrections in that regard.

So I don't think that that in any way prejudiced this man, he'd be tried on the merits of this case and the mere fact that this state may have a policy or not have a policy doesn't have any real bearing on him.

As a matter of fact, I'd say it would probably somewhat mitigate his circumstances if you're trying to shift the blame onto an agency or the government and away from an individual, to say that this crime was committed because of a policy of this state.

But in any event, there are a number of cases, there is the case which is Doctor versus Commonwealth, 227 Virginia, where articles kept coming right up to the day of trial, even the day of trial there were articles that [14] counsel kept saying were prejudicial and the Court there held "although the defendant's trial did attract certain attention from the press, the articles in the main were factual in nature and the voir dire revealed no bias or prejudice."

And it's within the sound discretion of the Court as to whether or not a change of venue or venire should be granted.

I would say at this point in time, Your Honor, there is no evidence before the Court that a fair and impartial jury can't be selected.

If at the time of trial it should appear that we could not impanel a jury, why then I'm sure the Court will take a different position. But at this stage I would ask the Court to deny the motion.

THE COURT: Ms. Rollison, regarding this motion, we just may be able to get a jury.

MS. ROLLISON: Your Honor, I agree with that. I was intending to ask the Court after I presented Mr. Wolverton on the stand, I have a specific reason in mind for calling him. Something that I wanted the Court to be aware of prior to trial.

THE COURT: All right.

[15] MS. ROLLISON: I was intending to ask you to withhold your ruling until we attempted to try to get a jury.

THE COURT: Then why do I need hear from Mr. Wolverton?

MS. ROLLISON: Pardon?

THE COURT: Then why do I need to hear some evidence? I mean, is he going to tell me something that I don't already know? For instance, that you haven't touched upon or is it something concerning a publication or what?

MS. ROLLISON: Yes. Basically, Mr. Wolverton will say that the Commonwealth attorney's office directed him to release Mr. Mu'Min's name on another alleged crime. And I was going to work that into an argument that it was prejudicial to him and they were inflaming the public. But that can wait to a later date. I have no problem with that.

THE COURT: Well, I don't want to cut you off but let me just point out to you that even capital cases, and I'm sitting here with the circuit court bench book on criminal procedure and kept up to date by the Supreme Court and it cites numerous cases dealing with the [16] question of voir dire of a jury.

Once you have learned from a jury in voir dire questioning that they have obtained some information concerning the case, from whatever sources, then you are obligated to ask questions, "Have any of you expressed or formed an opinion as to the guilt or innocence of the accused? And if there is an apparent affirmative indication then to ask the following questions. Considering what you've heard or read about the case do you believe that you can enter the jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?"

And then it goes on. "Are you sensible of any bias or prejudice against the Commonwealth or the accused?"

In capital cases we have a specific set of questions to ask, "Do you have any opinion such as to prevent your convicting anyone of an offense punishable with death," et cetera, and right on down through it.

I think that's plenty of safeguards to protect the accused. But more importantly, the whole reason for a change of venue or change of the venire is in order to get [17] a fair and impartial jury. And it seems to me that it's incumbent on us to see if we can get a fair and impartial jury within this county or within this jurisdiction, that's two cities and the county.

I've heard it said that in this particular area in spite of the volume of papers that you can get a fair jury for most anything that you want to.

I know that occasionally they move people to this area to be tried from other locations but it appears to me that it would be premature rule upon this motion at this time when I think that it's incumbent upon us—unless time is of the essence and I ask both counsel this so that we have it on the record, is time of the essence insofar as the trial, the date of the trial and within the limited period of time the Commonwealth has to try it? Can we deal with that or can that be dealt with?

MS. ROLLISON: I believe so, Your Honor.

THE COURT: Mr. Ebert?

MR. EBERT: Yes, sir.

THE COURT: All right. Then I think your motion is entirely premature. We are going to try to get a jury in this jurisdiction, the 31st Judicial Circuit. And if we can't then the next thing would be to see if we [18] can't a get venire in and I will tell you right now the venire would probably be requested of Fauquier County because it would be outside of the 8th Congressional District in which Mr. Brickley and Mr. Stan Parris were candidates.

Fauquier is in the 7th District as is a part of Prince William County and the City of Manassas, I might add.

But it's my considered opinion that we can get a fair and impartial jury. And if we can't we will then ask

for venire from the next contiguous jurisdiction and proceed with that.

I'm not making that ruling at this time. I'm only deferring any ruling on this until after we have tried and that's being done with the express understanding that both counsel for the defense as well as the Commonwealth assure me that we will not run into problems insofar as limitations within which to try the case.

Any response by either one of you?

MS. ROLLISON: No, Your Honor.

* * * *

[15] MR. FAHY: Yes, sir. Beginning with the request that the jurors be examined individually and out of the presence of each other, in writing we indicate that we rely on the applicable provisions of the United States Constitution and in respect to this motion, as well as certainly the one about peremptory challenges and sequestering the Jury, we're not asking you to do anything that you are prohibited from doing.

I think that's the starting point with these things. It's not that we're asking the Court to violate a rule or a statute or even case law for that matter. I don't think the cases, while you may find—may find a case that says something doesn't have to be done—any such case law as that doesn't say you can't do something.

This Court, Your Honor, has disgression and we're not asking you to do something illegal or prohibited. We think in asking, for example, for individual questioning out of the presence of other Jurors, we are asking for something that is proper and really necessary to accord this man—and really the Commonwealth for that matter —a fully fair trial.

[16] We can talk about the publicity that's involved in this case; we can talk about the death penalty aspect of this case; and because of those pecularities, if you will, in this case, it's important that these people be questioned individually and out of each other's presence to avoid contamination, if you will, and to allow for the

selection of a truly impartial Jury in this case, and the selection of the Jury in this case is really a critical part in view of the penalty.

With reference to our request for additional peremptory challenges, really the same arguments apply.

We're not asking you to do something that you are prohibited from doing, I do not believe; rather, we are asking you to exercise your disgression to do something that would enhance the fairness of this trial and assure compliance with those constitutional provisions we're trying to comply with.

Really, all the same arguments apply to the next request to keeping this Jury together and keeping it from being contaminated as this trial goes on from one day to the next. I think the same arguments apply and we would ask you to grant that request.

* * * *

[25] THE COURT: All right, let me go down the list of them as you've got them there.

The motion to individually sequester and voir dire—provided for questioning the jurors individually—that motion is denied.

We have in the past been through four of these cases in this Court; three of them have reached the Supreme Court of Virginia, and at least one that I was involved in before went to the Supreme Court of the United States, and in every case, I believe, there has been something less than a single one.

As of this time, it's my intention to have a normal Jury panel in initially, but when we get to the more specific questions that are obviously going to have to be asked in this type of case concerning the publicity, then in order to prevent the contamination, so to speak, of the entire panel, at that time I will put all that we still have in separate rooms and then we will go with perhaps four.

And I say that, because I don't want jurors, [26] they're here as servants of the people, a duty that they

have no choice in, and to bring them into a courtroom where they are by themselves and the only person at which four attorneys are staring in the court, and a number of witnesses, not to mention other personnel, obviously puts those individuals in a position of where they may well feel that they're the ones that are on trial.

It's been accomplished in the past by going to two's and three's and I believe in one case at least they were in foursome's. It's my intention to go, as I said, with the full panel to get the basic stuff out of the way and then break them down and start out at least with panels of four and if I contaminate a panel of four, I should still have sufficient jurors.

If I don't, we'll just have to recess until the following day, and get the two additional panel members necessary —additional jurors necessary to go forth.

If it becomes noticeable that perhaps questions are contaminating a whole sub-panel, so to speak, then I'll perhaps reduce it to two, but I do not intend to go to a single member of the mannire to voir dire and for that reason, that motion is denied.

* * * *

[33] THE COURT: All right, let's look at the questions that the Commonwealth has proposed. Any problems with those, Mr. Fahy or Ms. Rollison?

MR. FAHY: I don't believe that we have any objections.

MS. ROLLISON: No, sir.

THE COURT: On the questions that the Defense is asking, let me say this to you, gentlemen. That I follow pretty close and I think I do most of the time what is published for the Court under the Circuit Court Judge's Bench Book for Criminal Trials.

And many of those questions which you have suggested that you will be asking will be covered. [34] Needless to say, there is no necessity for redundancy.

A juror is not on trial and so if they answer, and they're all going to be asked to take the oath first to an-

swer the voir dire questions, and then subsequent to that, the panel itself will be given an entirely different oath. But to the extent that there's redundancy herein, I am not going to permit it. You can tell as well as I what your redundancy might be, and when you consider that which the Court is obligated to ask.

Now, with that much in mind, I will say to you that there are some in here that I feel as though are just not appropriate, but I'm going to let the Commonwealth comment.

What is your response?

MR. EBERT: Judge, if you'd go through them.

THE COURT: All right, sir, we'll just go through them, one by one.

MR. EBERT: I assume number 1 would be covered.

THE COURT: Number 1's going to be covered by the Court, it always is. Not only that question, but whether or not anybody or any members of the family or any of the jurors or any member of their immediate family— [35] and I would define that as being brother, sister, mother, father, son, or daughter. We can go one step further, or in-laws—brother-in-law or sister-in-law.

Whether or not they are known to be socially acquainted with and knew of the victim, as well as counsel, as well as whether or not anybody of that relationship to the juror has employed either one of you as private counsel? Those same questions I always ask.

So, that takes care of 1, I see no reason for it, I'll cover it. If it's not covered however, Mr. Fahy, Ms. Rollison; if I don't cover it, why you're going to be privileged to cover it.

All right, number 2.

MR. EBERT: Two, I assume that would be covered.

THE COURT: That's the same thing—covered by the Court, it's required . . . or suggested by the manual and I, generally speaking, always do that. I even go one step further in this from what counsel has asked; I'll probably find out if it is a business, is it a corporation and do any of them own any stock in it?

So, I'm not going to permit that 2. It's going to be redundant if I did.

[36] Three?

MR. EBERT: I don't know whether that would be covered or not, Your Honor, by the Commonwealth, but I wouldn't have any objection to it if it's not covered.

THE COURT: I will have covered it.

MR. EBERT: Four—Has anyone patronized Dale City Florist? I don't know whether that's relevant.

THE COURT: Well, if it was Murphy's Five and Ten, you'd ask did anybody patronize it? We might eliminate the whole Prince William County.

How is that relevant, and don't forget, gentlemen, the purpose of the Jury.

MR. FAHY: Well, if I may respond, Your Honor.

THE COURT: All right, sir.

MR. FAHY: I would say it's pertinent both under rule 38:14, which provides in part that counsel has a right and may examine under oath any perspective juror and ask any questions relevant to his qualifications as an impartial juror.

I'm not saying necessarily everyone that has patronized the place is necessarily—by that fact alone made impartial, but it may lead to the exposure of a person who by reason of patronizing a place is impartial.

[37] And I might add, 8.01-358 provides for examination for areas laid out there, including whether someone is sensible of any bias or prejudice, and then we go on—

THE COURT: It's not worth arguing over. The question's very simple, "Has anyone patronized Dale City Florist?" If they have, we'd go to something else. The question is ultimately going to do, has the fact that you patronized them at one time or another, would that make any difference into the outcome of the case? Could you sit here and hear the law and the evidence and reach a fair and impartial verdict in spite of that?

MR. FAHY: I'm sorry, Your Honor, will we—

THE COURT: So, I will permit you to have that.

"Do any of you live within a mile of Ashdale Plaza?" I don't see any problem with that; I'm going to permit that.

MR. EBERT: I assume 6 will be covered.

THE COURT: Six is going to already have been covered by the question—in voir dire questions that I must ask provide, "Are any of you related by blood or marriage to attorneys, etc., etc. Are you friends, [38] clients, or former clients of the Defense attorneys or the Commonwealth's attorneys?" That's already going to be covered. So, I deny you.

"Anybody contribute to or participate in Mr. Ebert's campaign?" I don't have any objection to that; I'll let that be asked.

MR. EBERT: I have no objection to that and I don't have any objection to the next one.

THE COURT: All right, sir, 8 is passed.

MR. EBERT: Mr. Maybee, normally he assists counsel and I have no objection to that.

THE COURT: Well, he's part of the prosecutorial team and I'll permit that one.

THE COURT: All right. If witnesses are going to be called by the Commonwealth? I usually ask the question pertaining to the names that appear on the bottom of the indictment and beyond that, I don't know specifically who they are, but I see no particular reason to deny them asking the questions. We're just going to have to learn up front who the witnesses are and I presume maybe, vice versa.

Can you be specific on those in time by Monday?

[39] MR. FAHY: Yes, sir, we'll have a list.

THE COURT: Ten is all right. 10A, rather, is used all the time.

MR. EBERT: Your Honor, with 10B, I don't know that that's relevant in this case—the fact that someone might hold a job at the highway department.

The highway department, nor the Department of Corrections, is on trial in this case. The fact that someone worked there or didn't work there, I don't think is really relevant and I don't know that that question needs to be asked.

THE COURT: I'm going to permit that question to be asked about whether they worked for the highway department within Prince William County.

MR. FAHY: We would object to—maybe I can say this objection once in the event that there are further limitations, but basically we're relying on statute that I've already cited on the rule I've already cited, and also on the general federal constitutional provisions we've rereferred to repeatedly, namely Amendments 5, 8—I'm sorry, 5, 6, 8 and 14.

The essence of all this, of course, is getting a fair and impartial Jury and we submit that by statute, [40] rule, and constitution that we ought to be able to inquire into the background a little bit of these folks to make those decisions to get a fair and impartial Jury, and I would argue and submit to Your Honor—at least, note as an exception—that if it's pertinent that the person has some highway department connection within Prince William County, I don't see where a county line makes a whole lot of difference.

They could have a connection with the highway department in Lorton—

THE COURT: This event did happen in Prince William, didn't it?

MR. FAHY: It did happen in Prince William.

THE COURT: And the accusation is that it happened while he was in the custody of an employee thereof or while in the commission—in the custody of a correctional facility or in the custody of an employee thereof—while in the state or a local correctional facility and while in the custody of an employee thereof.

I'm presuming, because I know that the state correctional system can deputize, and that's my term—not in any statute or any rules or regulations, nor is it used

in rules and regulations—but they can train [41] highway employees or other employees for the purpose of custody while they're out on work release. I think it applicable there.

Let me just say, I'm not—I guess I did cut you off, so go ahead and finish it up.

MR. FAHY: Well, I pretty much said it, but we're talking about a question, "Do any of you hold jobs with the highway department or held jobs in the past or have family or friends that hold such jobs?"

If I understand the Court correctly, I don't think it makes any difference whether they held the job with the highway department in Prince William, or Fairfax County, or their son has a job with the highway shop in Fauquier—I don't think any of those county lines are going to make any difference in terms of potential bias, because of that connection with the highway department.

And I might add so far as the prison system goes, I know from previous experience that many people, or some people, in Prince William County that work for the D.C. prison system out of Lorton, and maybe other connections. I don't think those county and state lines have a whole lot to do with the potential that because they are an employee of a prison system—

[42] THE COURT: Show me the relevancy. That's the purpose of it. Show me the relevancy, where it is going to be relevant, because I've got to make the decision.

MR. FAHY: Well, I would ask these people these questions—

MR. EBERT: In the interest of time, I'll withdraw my objection to it.

THE COURT: All right. Well, I may have some problem with it. I'm not going to just let you go on. We're not going to start just asking irrelevant things, so what's the relevancy of it then in Prince William County at basically the time involved?

MR. FAHY: Well, hypothetically, let's say somebody says, "Yes, I'm an employee or my son is employee of the D.C. prison system, working out of Lorton."

THE COURT: Excuse me just a second. You all excuse me just a second and I'll be back, I've got to take this message.

The Court's in recess. Be at leisure, right here in the courtroom.

(Brief recess.)

THE COURT: All right, where were we, Mr. Fahy.

[43] MR. FAHY: Your Honor, I think I was making my argument in favor of 10B through 10G, using a hypothetical example.

There are people, I would submit, or potentially people who are employed, or let's say have a son who's employed by a highway shop in another county, and we would like to inquire about that and inquire whether because of that fact, if somebody answers that question affirmatively, maybe many of them will not, but inquire then whether that would have any effect on their ability to impartially decide this case?

I think, Your Honor, had indicated some limitation as to the county lines. We would suggest that—

THE COURT: Northern Virginia.

MR. FAHY: I think the prison system is a statewide system.

THE COURT: Well, there's no question about the prison. We're talking about the highway department.

MR. FAHY: Well, the highway department also, I believe, is a statewide system. It has local highway shops, but the potential for bias there doesn't respect county lines or any other geographical—

[44] THE COURT: We've already covered the question as to whether or not anyone's sensible to any bias or not anyone's sensible to any bias or prejudice against either the Commonwealth or the accused.

MR. FAHY: Well, Your Honor, I would submit, I think the rules and the statute and the case law back me up that—

THE COURT: Prove it. Show me the case law.

MR. FAHY: I would go so far as to say the Mackall case that was recently decided, where we were talking about—in that case, when it had questions about cashiers.

Now, the Court in that case recognized that some inquiry about cashiers was pertinent inquiry. It took exception with the number of questions, I believe, and thought maybe the issue had been covered by other questions, but the principle was recognized.

THE COURT: I just got through saying, it boils down to you want to know whether there's any bias or prejudice, and you cover that in one general question.

MR. FAHY: I don't think it can be covered in one general question.

THE COURT: Does the Commonwealth want to be heard on its?

[45] MR. EBERT: I think you can certainly cover it in one question. It looks like to me if you go through these questions, "Do you hold jobs, do you have any family or friends?"

You say do you or do you have family or friends—10E says "Do you hold jobs at the Department of Corrections?" and then the next question, "Do you have family or friends . . ." I think we can boil all those down, like to, "Do you or your family or friends hold jobs at the Department of Corrections?"

MR. FAHY: Maybe, I haven't made this point clear to Your Honor. The crime scene here—the allegation is that this Defendant left the Dale City Highway Shop and went to a nearby location where the alleged crimes were committed.

And then the other aspect of that is this Defendant is incarcerated at this time and at the time of the alleged offenses he was incarcerated, assigned to the Haymarket Field Prison, if you will, of our state prison system.

So, I'm asking about highway relationships, or highway department relationships, and prison relationships in view of that background. That's why we asked these [46] questions.

THE COURT: I ask you to limit your questions to asking in one question whether or not they, or members of their immediate family or any close friends, have ever been employed by the Department of Highways and Transportation or the Department of Corrections or a department of corrections? And then we'll go from there.

The chances are so slim that there would be very many to answer it. I guess it would take more time to argue these things now than to get the questions out of the way.

But you can consolidate 10D through G; you can consolidate all those by just adding the Department of Corrections, jails, prisons, or highway departments, and add friends, jurors, members of their immediate family, or any close friends.

All right?

MR. FAHY: Well, Your Honor, we would note our exception. We will abide by the Court's ruling and make that—

THE COURT: You're getting everything. Instead of being in six questions, which are redundant, you're combining them all into one question and getting a [47] response and then you can go from there.

MR. FAHY: I believe the Court has limited us to immediate family and close friends.

THE COURT: Well, the juror, members of their immediate family, or close friends.

Now, if you're trying to get friends—I mean, that's a long, long terminology. If you can show me how just friends—acquaintances or friends—

MR. FAHY: That's fine. To a certain extent we rely on—

THE COURT: Your exception's duly noted for the record. You've got to prove some relevancy to the questions.

All right, we go then to 11.

MR. EBERT: I don't have any objection. I think you and combine 11 and 12, "Do you now, or have you in the past, had a law enforcement job?"

THE COURT: Well, I thought that was already covered back here. Ten is the one.

MR. EBERT: Ten-A says, "Do you have any law enforcement officers as friends or neighbors?" You might be able to combine all three.

THE COURT: Eleven and 12 can easily be [48] combined as one, and should be combined as one, and permitted.

Thirteen?

MR. EBERT: I know that's covered, under that 10A.

THE COURT: You've got that in 10A, haven't you? Isn't that redundant?

MR. FAHY: Well, certainly—one says, "Do any of you have law enforcement officers as friends or neighbors?" and 13 says, "Do you any of you have family or friends—" We can certainly combine them in one, I'm sure.

THE COURT: Please do—10A and 13—permitted.

Fourteen is permitted.

MR. EBERT: Fifteen, I think is—

THE COURT: Fifteen's covered by a requirement of the Court.

MR. EBERT: Sixteen? Is that covered?

THE COURT: That's covered by a requirement of the Court.

Seventeen is covered by the Court.

Eighteen? Any objection to that?

[49] MR. EBERT: No objection.

THE COURT: It's proper; it will be granted.

"Have any of you served as jurors before?" That's proper.

This is a new Jury, so there will be some, but this is the first time this Jury's ever been called this term. This is a new Jury for the term, let's put it that way.

Twenty is all right.

MR. EBERT: I don't see where 21's relevant.

THE COURT: What's the relevancy of whether or not it's a foreman?

MR. FAHY: Well, Your Honor, remember we're getting at an impartial Jury. This information helps us in making intelligent strikes. It certainly doesn't embarrass any prospective juror; it doesn't—

THE COURT: It's not worth arguing over; I'm going to permit it.

MR. EBERT: If it please the Court, we're not here to make intelligent strikes; we're here to show bias or prejudice, and the fact someone's a foreman doesn't have anything to do with his bias or prejudice.

THE COURT: Your chances of getting that [50] question answered is probably one out of ten thousand or more. It can be asked and I can't imagine it embarrassing anyone, but nor can I imagine it's going to have any effect either way, but I see no reason why it shouldn't be asked. I'm going to permit it.

Twenty-two I am not going to permit. I can't imagine that anybody feels that they're entitled to a Jury of people who never knew each other or never spoke to each other and in essence, that's what you're saying.

MR. FAHY: Well, we note our exception, Your Honor.

THE COURT: State the reason why you think it's relevant.

MR. FAHY: Our thinking is this. We would want to know if somebody knows one another and if so, would their relationship before they came into this room be such that their opinion might be swayed by the other person—their ability to deliberate impartially. The fact of the matter is, this world's made up of leaders and followers and—

THE COURT: The question you ask is acquaintance. You didn't ask if they're close friends or something—acquaintance.

[51] MR. FAHY: Well, I'm simply asking whether they know each other and would that fact that they've known each other before they walked in this room have—affect their impartiality, insofar as their deliberation?

THE COURT: The answer is no.

"Have any of you been victims of a crime?" is correct. It's permitted.

"Family members been victims of a crime?—perfectly all right.

MR. EBERT: I think you can combine those two. "Have you or members of your family been victims of a crime?"

THE COURT: Can be and should be.

Twenty-five will be permitted.

I'm going to be covering 26, so it won't be necessary—it would be redundant.

I'll be covering 27.

Twenty-eight's permitted.

MR. EBERT: Objection to 29.

THE COURT: All right, I think he's entitled for the question to be asked. I don't know that it's in the right form.

There's a case on that that I dealt with [52] yesterday and it'll take me some time to find it, but he's entitled to that one.

MR. EBERT: I think he can ask the question, but the fact that one's white and one's black, will that have any bearing on it—the circumstances? But to go into, "in your heart of hearts and by your deliberations"—I mean, "your determinations."

THE COURT: Well, not only that, the next sentence, "She was found nude from the waist down." That's presupposing what the evidence will be, is it not? Do you want to tell them up front what the evidence's going to be?

MR. FAHY: Well, we do that all the time, don't we?

THE COURT: Well, we haven't got opening statements yet.

MR. FAHY: I have no doubt that there's going to be evidence that she was found partially disrobed, so I have no problem with that. Seems like many questions necessarily have as a predicate some statement about what the facts are. If the Commonwealth indicates that that's not going to be the fact, then maybe I do need to change it, but I believe that is a fact.

[53] And if I may, as to the pertinence of it, we do have an interracial matter and I think—let me say this then in support of this type of question.

In my experience, it's a difficult thing for jurors to concede in response to some of these questions that yes, something might affect their thinking. And that might be particularly true in the case of the racial area. But I would also suggest that that issue becomes even more sensitive in the area of when you combine a sexual component and a racial component.

In other words, there are many people, I would suggest, in this world who might think themselves pretty liberal about race matters, but if you juxtapose race and sex, they might have some biases that we need to be apprised of if it's going to affect their ability to make an impartial decision.

So, I'm simply suggesting that we have a white victim, a black Defendant, we have a body found partially nude, and I'm asking—I used the word "heart of hearts"—I don't really care about the language, but I'm trying to get these people to think way down.

THE COURT: Let's see what Mr. Ebert has to say about it.

[54] MR. EBERT: I think he can ask the question, "Does the fact that it involves a sexual connotation between a white and a black—the victim's white and the Defendant's black—would that have any effect on you?"

But to go on this question, really the form of it, I don't think is at all proper—heart of hearts isn't the language of the law and it's not the test, if anybody knows what the heart of hearts is.

The by due deliberation, he goes on and trys to determine . . . to define what their deliberations are. That's for the Court to do.

THE COURT: I'm going to ask you, Mr. Fahy, to strike out the words, "in your heart of hearts." Let's take out too, "She was found nude from the waist down. Do any of you believe that your deliberations might be affected by these facts?" I don't know what heart of hearts means.

MR. FAHY: Well, I'm not wedded to that language, Your Honor, but I do want to get these people to reflect.

THE COURT: You're entitled to ask the question on voir dire concerning bringing out their racial differences.

[55] MR. EBERT: There's no question about that, but when you start talking about "in your deliberations," we're getting off on something that's down the road.

We're trying to get their disposition at this point in time. If they have any feeling or prejudice or bias as they come to that jury box, because of a fact or circumstances that would affect their judgment.

THE COURT: We want to know that up front.

MR. EBERT: That's right and I think we can ask that question.

THE COURT: We can ask that question and if it's going to affect their deliberations down the road, we need to know it up front. The evidence itself might cause it to affect their deliberations, but I think it's a question that, striking that language I asked him to strike, would be appropriate, and I will permit that.

He is attempted—by your deliberations, he means to determine the Defendant's guilt or innocence—I don't think we need to go into that.

Last sentence where you define deliberations, I'm going to deny that portion of it, "and should you be called upon to deliberate in the sentencing stage."

So, what I'll permit is the question as it's [56] prepared, striking the words in sentence number four, "in your heart of hearts," and making a capital D—"Do, leave that as it is and at the end of the question, strike the remainder of that statement wherein you are stating what you mean by deliberations. Let them define what their deliberations are.

All right, it will be permitted in that fashion.

Question 30?

MR. EBERT: I have no objection. I assume the Defendant's a Muslim.

THE COURT: Well, I'm assuming that by the name, but that is the case by the nature of the question. Is that correct, Mr. Fahy?

MR. FAHY: We would ask to change Muslim to Islamic, after conferring with our client.

MR. EBERT: I have no objection.

THE COURT: That's appropriate and will be permitted.

MR. EBERT: I assume the Court would object to 31, but the following questions on that page, I would assume, would pretty much be covered by the Court.

THE COURT: I'm going to be covering that. [57] I'm not going to tell them what section of the code provides for it, but I'm going to be covering the question, "Have you acquired any information about this case and so forth and so on," as set forth in the statute?

Specifically, the rules 14A under Model Voir Dire Questions in the Judge's Handbook reads, "Have any of you acquired any information about the alleged offense or the accused from the news media or other sources, and if so, would that information affect the impartiality in this case?"

That's what I intend to ask and the rest of the question is whether what they know—we don't have to ask them to tell what they know—what they know, they have to answer the question, "Would it affect the impartiality of this case?" and that's what I'm going to permit.

MR. FAHY: Do I understand the Court to say that we're not permitted to ask them what it is they know about the case?

THE COURT: No, I'm not going to let you ask that. I'm going to ask the question whether or not what they know—regardless of what it might be—would that information affect your impartiality in this case.

[58] That's the question that's been approved by—as a matter of fact, this manual is approved by the Supreme Court and put together by Judges thereof, I presume.

MR. FAHY: Your Honor, we would note our exception—

THE COURT: Exception duly noted.

MR. FAHY: —on the authorities we've already cited.

THE COURT: I think 35 is appropriate. Thirty-one through 34's going to be covered by the Court, and your exception noted as to the reason why.

Thirty-five—"Have you discussed this case with anyone?" I think that's appropriate.

MR. EBERT: Thirty-eight, I object to, going into the substance of what was discussed. I think whatever it was, they can answer whether or not they formed an opinion.

THE COURT: Thirty-six and 37 are going to be permitted.

Thirty-eight will be denied for the same reasons I said back up on 31 through 34. The question—if they've discussed—an appropriate question would be, [59] "Would what you discussed in any way affect your impartiality in this case?" I'll permit you to ask that.

"Have you discussed this case with anyone? With whom, when and where?" "Would what you have discussed affect your impartiality in this case?"

I'll let you ask that one, but I'm not going to let you ask what did you discuss. All right?

MR. FAHY: We would note our exception again.

THE COURT: All right.

"Have you formed an opinion or conclusion of this case?"

MR. EBERT: I have no objection to that. Court will probably ask that, won't you?

THE COURT: I would already have covered it. My question, "Have any of you expressed or formed any opinion as to the guilt or innocence of the accused?"

Just for your edification, gentlemen and lady, if there's an apparent affirmative indication, then the following questions are asked.

"Considering what you've heard or read about the case, do you believe that you could enter the jury box with an open mind, wait until the entire case is presented before reaching a fixed opinion or conclusion as to the [60] guilt or innocence of the accused?" That's the language I would use.

So, your 39's going to be covered by the Court.

MR. EBERT: If that's the case, then so will 40.

THE COURT: And 40 will be covered by the Court.

MR. EBERT: I think, Your Honor, 41 and 42 is included in 35—"Have you discussed this case with anyone?" It's the same thing as, "Has anyone expressed an opinion about this case to you?"

THE COURT: That's redundant, is it not, Mr. Fahy?

MR. FAHY: I don't think any of this is redundant, Your Honor.

THE COURT: Well, you haven't looked at it yet, have you?

MR. FAHY: Oh, yes, sir.

THE COURT: All right. Well, look at 35. "Have you discussed this case with anyone?"

Forty-one, "Has anyone expressed an opinion about this case to you?" What's the difference?

[61] MR. FAHY: I think there's a difference where someone has—there can be a discussion or someone can overheard something without somebody expressing an opinion.

THE COURT: Then why do you ask 42 then? "Who, what, when, where?"

MR. FAHY: Yeah, I think there's a difference—

THE COURT: The answer's no, your exception is duly noted for the record. I'm not going to listen to anymore argument on it.

All right, 43?

MR. EBERT: I'm going to object to that. I think the question to be asked on the death penalty is whether or not they can consider death or life under the appropriate circumstance. I think this very question came up in the Mackall case. What their opinion is—either for or against the death penalty—really their personal opinion isn't really relevant.

It's whether or not they could impose the death penalty or life penalty under the proper circumstances, and for that reason I'll object to that question and particularly the following question, when you get down to how strong is it, how long have you held it? [62] I don't think that's at all relevant.

In fact, the whole question is not what the law requires. Under *Wainwright vs. Witt*, and cases along that line, the test is whether or not the Jury can consider both aspects of a potential punishment.

THE COURT: Mr. Fahy.

MR. FAHY: Your Honor, some of these questions, namely 43 and 44 and I think 47, were asked in Mackall. In that opinion of the Virginia Supreme Court, I think they ruled that it was not error for the trial court to refuse to permit those questions; however, I still think those questions—

THE COURT: Then they weren't asked, were they?

MR. FAHY: Pardon me?

THE COURT: They weren't asked at this time.

MR. FAHY: We requested to ask those questions.

THE COURT: And the Court denied them.

MR. FAHY: That's correct.

THE COURT: And the Supreme Court upheld them?

MR. FAHY: The Supreme Court ruled that it was not error on the part of the trial court to do that, and

[63] if I may, I would simply suggest that with all due respect to the Virginia Supreme Court, that they're not the final word on some of these constitutional arguments and we ask to ask these questions in light of the federal constitutional provisions, in particular that that would authorize this Defendant an impartial Jury.

We think it is appropriate under *Wainwright v. Witt* to ask questions like this, because the test here in this death penalty area is whether a person's opinion would impair, or significantly impair or substantially impair—I forget . . . I could find that language for you—but in any event, it's a relative sort of thing, if you will.

And in order to find out whether someone's ability to decide impartially is impaired, you have to ask questions to find out how strong their views are, how long they've held them, what they are for that matter, and you can't get that sort of information with a sort of a five-second, yes and no interrogation as to whether they're going to follow the instructions of the Court.

I know these questions take more of the Court's time, but I think the goal here in a death penalty case—to get an impartial Jury—the significance of [64] that makes the length of time it might take us to ask these addition questions immaterial or of little significance.

I think they're constitutionally warranted, federalwise anyway, not withstanding what the Virginia Supreme Court has ruled, and I don't think the Virginia Supreme Court said you couldn't allow these questions. It just said it was not error on the trial court not to permit them, which I would take to mean in Your Honor's case that you're not prohibited from allowing us to ask these questions in this case.

THE COURT: The Court starts out by saying that the trial court has great disgression in these, does it not?

MR. FAHY: Yes, sir.

THE COURT: Where do you end up? The real question is whether or not they can follow the mandate of their oath that they're going to be required to take. That

is, to try the case based upon the law and the evidence and follow the dictates of the law and evidence, whether they like it or not. Isn't that it basically?

MR. FAHY: I think the ultimate question is that which is posed by *Wainwright v. Witt*, which says in [65] effect if their opinion with respect to the death penalty significantly impairs their ability to impartially decide the case. That's the bottom line, and these questions are designed—

THE COURT: Ask that up front.

MR. FAHY: These questions address that issue.

THE COURT: We ask that question up front. I think the questions are covered by the Court. I think the question boils down to whether or not they—and as to their view about capital punishment, I don't think you or I are entitled to know specifically what each juror's view might be.

The think that we are entitled to know is, is their view so strong or such that they cannot take an oath to follow the Court's instructions and the evidence of the case?

Now, if the Court's instruction is that capital punishment is a possibility and they would have to breach their oath, then it's irrelevant and they could not, of course, accept. But as far as learning what their opinion or view is and how long they've held it and how strong they've held it, it's not appropriate and the Court will not permit it.

[66] Forty-three, 44, 45, and 46 are refused.

Forty-seven?

MR. EBERT: I think that's the same thing, Your Honor. It relates back to the other question, "Would your opinion and views favor"—assuming they favor it; they might oppose it—"have any affect on your choice between life and death, imprisonment, punishment in the appropriate case?"

They've already said they could consider the law and the evidence and consider both aspects of an appropriate punishment.

THE COURT: Do you want to be heard anymore on 47?

MR. FAHY: Your Honor, as originally drafted, 47 was a follow-up to 43 through 46. We take exception with the Court's denying them, but I can see that it was written as a follow-up to those questions.

THE COURT: Forty-seven's denied. Forty-eight's denied—I mean, 47A's denied—"What does a life sentence mean to you?" That's denied.

Forty-seven B?

MR. EBERT: I object to that.

MR. FAHY: Your Honor, may I just state for [67] the record very briefly on 47A?

THE COURT: All right.

MR. FAHY: We think it's appropriate to know, if I'm not mistaken, it would be appropriate for the Court to instruct the Jury that they're not to consider what might happen afterwards and I suppose our system is set up with these instructions in mind with the idea that the Jury is not going to think about parole and that sort of thing. That's not the facts. The reality is different.

We have a group of people that walk in off the street and they know a little bit more than the system suggests they do. So I think this is an appropriate question.

What are these people thinking about life imprisonment? If they think the guy's going to walk out in seven years or something, I think it's appropriate for us to know about that when we select the Jury.

THE COURT: Well, I'm not in the position to ask you questions, but suppose you ask them, "What do you think seven years means?"—I use your figure, seven years.

MR. FAHY: I don't know that I would—

THE COURT: Well, where are you going to stop? [68] The answer is, you don't ask them. They've got to follow the instructions of the Court and if the Court instructs that you're entitled to the death penalty or life imprisonment, then life means what is common language,

what common usage of the English language is. I'm denying your 47A.

Forty-seven B?

MR. EBERT: I object to that. That kind of sets the standard as to ask whether or not mercy should have nothing to do with the law. That isn't a proper question.

THE COURT: Do you want to argue 47B, Mr. Fahy?

MR. FAHY: Yes, sir. As I recall the statutes, the Commonwealth, of course, has to prove him guilty of the capital murder felony. They also have to prove one of the aggravated circumstances and then even then, the Jury doesn't have to impose the death penalty. So, I think that question is appropriate.

If a person is going to make that punishment decision on the facts of the murder itself and not be willing to follow the statutes as I've suggested they are written, then they ought not to be on that Jury. I think [69] it's a fair question.

THE COURT: Forty-seven B is denied.

Forty-seven C?

MR. EBERT: The Court's going to instruct them, I would assume, on what they're to consider, because they're going to have to consider whatever evidence they get at that time, but I don't know whether they're going to get—I don't know what's going to be considered history or special circumstances or what else. I think that the Court is going to certainly instruct them as to what they should consider in making that decision.

THE COURT: Anything you wish to say about it, Mr. Fahy?

MR. FAHY: Your Honor, again, I think it's designed to find out whether these people are going to follow the law and—

THE COURT: They're going to tell us whether or not they can follow the law. If they can't follow the law, we're going to strike them for cause.

MR. FAHY: Well, I would submit this question is a legitimate one designed to find out whether they will consider other things that by law may be considered.

THE COURT: For the reasons previously stated, [70] it's denied.

Forty-seven?

MR. EBERT: If it please the Court, I'm going to object to that. The people charged with his supervision are not on trial and it doesn't make any difference whether they're negligent or otherwise. That has nothing to do with whether or not he committed the crime.

In fact, we can stipulate if he'd been in shackles or someplace else, he perhaps could not have committed the crime, but that's not relevant, that's not the issue before the Jury.

If in fact he did commit it, and if in fact had he been someplace else, he couldn't have committed it, isn't relevant in this case.

THE COURT: Mr. Fahy.

MR. FAHY: It may not be relevant at guilt phase, but it's certainly relevant at sentencing and if these jurors would not consider that, then they ought not to be sitting. I think that's an appropriate question.

THE COURT: That question is denied.

Forty-eight?

MR. EBERT: All these other questions, Your [71] Honor, will be covered in the Court's instructions. They're going to have to consider, they're going to have to say under oath whether or not they can consider death and life equally under the facts and circumstances, and to go through this I think is really redundant, particularly when you get into, "Do you hold your view strongly? Would it be hard for somebody to change your mind?" That's not a proper question to ask a juror.

THE COURT: All right, Mr. Fahy.

MR. FAHY: Again, we do have a series of questions. Forty-eight, 51, and 54 and then again, really 57 and 58 are death penalty questions that are specific to this case.

In other words, we have an indictment that advances three different theories of capital murder and I don't believe the Court's questions will be as specific to the different theories that these questions would be.

It is not sufficient, I would submit, in order to get an impartial Jury to talk in generalities. We need to specify in this we're talking about capital murder and the commission of a robbery, or capital murder and the commission of rape. These different circumstances might affect the ability of different jurors to deliberate [72] impartially.

And then, 57 and 58 just go into the aggravated circumstances provisions and again, they make the death penalty questions more specific, more meaningful and therefore allow us to arrive at an impartial Jury.

And I would submit they're all appropriate, and in the absence of specific questions specific to this case coming from another source such as the Court, then I think these are very much appropriate.

THE COURT: All right, 48 through 56 is denied. The Court's going to instruct as to the law and as to what can be the punishment for someone charged with and found guilty of any one of the three different elements of the capital case that he's charged with.

And then the question's going to be asked, more than once from the looks of these things, as to whether or not they can follow the Court's instructions and reach a fair and impartial verdict based upon that, irrespective or irregardless or what their personal views might be.

The legislature's made the decision that death is an appropriate penalty under certain circumstances, three of which happen to be the ones being charged here.

[73] So, the question is, can they follow the law as instructed by the Court and if they can't, then they'll be struck for cause. If they can, why then I believe them to be appropriate jurors.

Forty through 56 is denied.

MR. FAHY: Your Honor, I've already made my comments in support of 57 and 58. They are similar to the questions you've already ruled on, except they then tack on reference to the aggravating circumstances and I would just reiterate my argument that I've already made.

THE COURT: All right, Mr. Ebert.

MR. EBERT: If it please the Court, I think this goes along with the same line of the other cases. The Court's going to tell the Jury what the law is and they're going to have to say under oath that they can consider the law and they can impose either of the two alternatives, in the event they get to that stage.

I think this is, again, inappropriate at this stage. We don't even know what the Court's going to instruct. You may not instruct as to all these elements set forth in 57 and 58.

THE COURT: All right, that covers them all, because I deny those two.

[74] MR. FAHY: Yes, sir, and Your Honor, I just wanted to—I haven't jumped up and down every time, but I want to note for the record that we do take exception with the various denials that the Court has made.

I think I've got in the record our position with respect to those denials, but I would reiterate it. It's based on the rule that we've made reference to. I know that's in the record, and the statute, which is 8.01-358, *Wainwright v. Witt*, which we have cited, and the constitutional provisions being the fifth, sixth, eighth, and fourteenth amendments. And it can't hurt, I'll mention Article I, Section 8 of the Virginia Constitution. I think that's the proper reference.

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IN THE CIRCUIT COURT
OF PRINCE WILLIAM, VIRGINIA

(Caption Omitted in Printing)

EXCERPTS FROM VOIR DIRE

[9] With that much introduction and that much having been said to you, I would ask you are any of you or any members of your immediate family related by blood or marriage to the accused, Mr. Mu'Min?

Incidentally, I should perhaps tell you that his name is also—was before he had it legally changed, was Mr. David Michael Allen.

Are any of you or members of your immediate family related by blood or marriage to Mr. Mu'Min?

THE JURY PANEL: (No response.)

THE COURT: Or to Ms. Nopwasky?

THE JURY PANEL: (No response.)

THE COURT: This is alleged to have taken place at Dale City Carpet I believe is the name of that. Is that correct?

MR. EBERT: It's Dale City Floors.

THE COURT: I beg your pardon?

MR. EBERT: Dale City Floors.

THE COURT: Dale City Floors in the Ashdale Plaza Shopping Center.

Have any of you or any members of your immediate family ever been employees of that operation?

[10] THE JURY PANEL: (No response.)

THE COURT: Are you stockholders?

THE JURY PANEL: (No response.)

THE COURT: Are you knowledgeable or have a friendly relationship with anyone that worked in that store?

MS. SANTIAGO: (Indicating.)

THE COURT: For the time being, I'm just going to ask you to answer the questions yes or no.

Because of the nature of this case, we perhaps will—well, there's no doubt about it, we're going to have to take the Jury out as a group and bring you back in smaller numbers so as to question you more specifically.

But counsel will be making a record of that.

MR. FAHY: Your Honor, may I just ask them to say their name if they're answering affirmatively to something?

THE COURT: I wish we had numbers, but under the circumstances we'll have to ask you your name, please.

The lady, the person who answered that, your name, please, ma'am.

MS. SANTIAGO: Alexandria Santiago.

THE COURT: Ms. Santiago.

[11] Anyone else?

MS. DEIOTTE: (Indicating.)

THE COURT: Ms. Deiotte.

Are any of you friends, or clients, or former clients of either Mr. Paul Ebert, Mr. William Ryland, Ms. Lawrie Rollison, or Mr. Ronald Fahy?

MS. DEIOTTE: (Indicating.)

THE COURT: Excuse me.

MS. DEIOTTE: Donna Deiotte.

THE COURT: Ms. Deiotte.

Any members of your immediate family that you are aware of that have ever been clients of any of those four attorneys?

Yes, ma'am. Your name, please.

MS. HAINES: Mrs. Haines.

THE COURT: I can ask both Ms. Deiotte and Ms. Haines at this time, would the fact that you have been a client of or members of your immediate family may have been clients of any one of those attorneys, would that have any effect upon you in this case?

In other words, could you sit here and hear the law and the evidence, the law being that which I tell you is

the law, the evidence will be that which you hear [12] from the mouths of the witnesses on the witness stand, and reach a fair and impartial verdict based upon the law and the evidence without regard to the fact that you had a close relationship as attorney-client with one of those attorneys?

Is there anyone that could not do that?

MS. DEIOTTE: I've also been a witness for the Commonwealth.

THE COURT: We'll get to that a little bit later on, Ms. Deiotte.

She's been a witness for the Commonwealth.

The fact that you've been a witness for the Commonwealth, does that cause you any problems?

Can you reach a fair and impartial verdict based upon the evidence in this case and the law that I tell you is the law, without regard to the fact that you've been a Commonwealth witness in the past?

MS. DEIOTTE: I don't know.

THE COURT: We'll give you some more time to think about that, and we'll call you back later on under the circumstances.

Do any of you have any interest in the outcome of the case?

[13] THE JURY PANEL: (No response.)

THE COURT: Are any of you sensible to any bias or prejudice against either the Commonwealth or the accused?

THE JURY PANEL: (No response.)

THE COURT: This is a case in which a Jury may have to consider punishment in a capital murder. It involves capital punishment.

Do any of you have an opinion such as to prevent you from convicting anyone of an offense punishable by death?

And I'll ask if there is such an answer, for you to let it be yes and nothing more.

Does anyone have such a religious or otherwise conviction?

THE JURORS: (Indicating.)

THE COURT: The answer is yes for the two of you. The name of the gentleman, sir?

MS. SUTER: William Suter.

THE COURT: And?

MS. FELMLEY: Martha Felmley.

THE COURT: And Mrs. Felmley.

MR. FAHY: I'm sorry. Her last name, please.

[14] THE COURT: Felmley.

MR. EBERT: Felmley.

MS. FELMLEY: Felmley.

MR. FAHY: Thank you.

THE COURT: Is there any Juror who could never impose the death penalty or who would refuse even to consider its imposition in this case?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who could never impose the death penalty, or who would refuse to even consider its imposition in the case if the evidence justified and he was found guilty beyond a reasonable doubt of the crime?

THE JURY PANEL: (No response.)

THE COURT: If you were to sit as a Juror in this case and the Jury were to convict the Defendant of capital murder, would you be able to consider voting for a sentence less than death?

Is there anyone that would not be able to consider one if he was convinced beyond a reasonable doubt that the charge had been proven—is there anyone who could not consider a sentence of less than death—in other words, life imprisonment?

[15] THE JURY PANEL: (No response.)

THE COURT: Is there anyone on the Jury Panel who cannot accept the rule of law that one is innocent until proven guilty beyond a reasonable doubt?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who cannot accept the rule of law that the Commonwealth must prove the Defendant's guilt beyond a reasonable doubt?

THE JURY PANEL: (No response.)

THE COURT: I should say, is there anyone that could not accept the premise that a person is innocent until proven guilty beyond a reasonable doubt even though he or she has been—in this case he has been indicted and is on trial?

In other words, the fact that he's been indicted and is on trial cannot be considered by you. He is presumed to be innocent at this point.

Is there anyone that cannot accept that?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone that does not understand that a Defendant does not have to produce any evidence in defense of his case?

THE JURY PANEL: (No response.)

[16] THE COURT: Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?

Is there anyone who has acquired any information from the news media or from any other source?

THE JURORS: (Indicating.)

THE COURT: All right. There are a number of hands. Let's start over in the corner in the way in which they were called out.

The first gentleman, sir?

MR. MERRITT: Fred Merritt.

MR. BOOTHE: Carrington Boothe.

THE COURT: Carrington Boothe, and then on down the line.

MR. RUNION: Mr. Runion.

MR. FAHY: I'm sorry?

THE COURT: Al Runion, Mr. Runion.

MR. LAYTON: Mike Layton.

THE COURT: Mr. Layton, and next?

MS. WALTERS: Sheila Walters.

THE COURT: Sheila Walters.

And the gentleman in the corner.

MR. TAYLOR: Taylor.

[17] THE COURT: Mr. Taylor, and which direction did we come from? Back up here. The lady in blue.

MS. HAINES: Mrs. Haines.

THE COURT: Mrs. Haines. Sir.

MR. SYPHRETT: Dennis Syphrett.

THE COURT: Mr. Syphrett.

MR. SUTER: William Suter.

THE COURT: Mr. Suter.

MS. WOLFE: Rita Wolfe.

THE COURT: Ms. Wolfe.

MS. THORPE: Evelyn Thorpe.

THE COURT: Mrs. Phillips; is it?

MS. THORPE: Thorpe.

THE COURT: Thorpe, I'm sorry.

MS. FOREHAND: Ms. Forehand.

THE COURT: Ms. Forehand, and anyone else down the line?

All right the first lady here, the one with the blue suit on. Your name again.

MS. FELMLEY: Martha Felmley.

THE COURT: Ms. Felmley.

MS. DAME: Sandra Dame.

THE COURT: Ms. Dame.

[18] MS. DEIOTTE: Donna Deiotte.

THE COURT: And Ms. Deiotte.

MR. FAHY: I'm sorry. I think one of the ladies in the front row.

THE COURT: The first lady.

MS. DILLON: Cheryl Dillon.

THE COURT: Ms. Dillon.

MR. FAHY: And I missed the name after Ms. Felmley, I think.

MS. DAME: Sandra Dame.

MR. FAHY: Dame, thank you.

THE COURT: A follow up question on that.

Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?

Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

MR. SYPHRETT: (Indicating.)

THE COURT: Your name, sir?

MR. SYPHRETT: Dennis Syphrett.

THE COURT: Mr. Syphrett.

[19] Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

Is there any person who has already formed an opinion as to the innocence or guilt of the accused?

THE JURY PANEL: (No response.)

THE COURT: Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

Is there anyone who could not do that?

THE JURY PANEL: (No response.)

THE COURT: I'll repeat it in a different fashion.

In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind, and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

MR. SYPHRETT: (Indicating.)

[20] THE COURT: Yes, sir.

MR. SYPHRETT: Dennis Syphrett.

THE COURT: And you feel that you could not, sir?

MR. SYPHRETT: It would have to take an awful lot to change my mind.

THE COURT: So you've formulated an opinion already, sir?

MR. SYPHRETT: Pretty strong.

THE COURT: Does either party have any further questions to ask him at this time?

MR. EBERT: May I ask a question, Your Honor.

THE COURT: Commonwealth first.

MR. EBERT: Mr. Syphrett, could you put that aside, your personal feelings, and judge this case solely on the law and merits as the Court has explained to you?

MR. SYPHRETT: Like I say, it would take quite a bit to convince me otherwise.

THE COURT: I'm sorry. I'm not going to let any more questions be asked.

MR. EBERT: I'd say perhaps he should be released.

THE COURT: Mr.—

[21] MR. SYPHRETT: Syphrett.

THE COURT: Sir, I'm going to have to excuse you. Thank you very much for your attendance here.

I would ask you to step down, and I'll ask my Clerk to call the next person to fill your void.

MR. SYPHRETT: Thank you.

THE COURT: You may go down the hall if you like, right out that door, and you're excused. You do not have to go back in the Jury room.

All right. The next Juror.

THE CLERK: Paul Tsou.

(Whereupon, Mr. Tsou was sworn by the Clerk of the Court.)

THE COURT: Come and have a seat in the Jury box, sir, at this end. I think it would be closer.

His name for the attorneys, again.

THE CLERK: Paul Tsou.

MR. TSOU: Tsou.

THE CLERK: Tsou, T-S-O-U.

THE COURT: Has everybody got it?

MR. FAHY: Yes, sir.

THE COURT: Mr. Tsou, I'm sure you've heard the questions I've asked of you, and you've been sworn now [22] as a panel member. But I must for the record repeat these questions.

Are you, or do you know of any members of your immediate family that may be related by blood or marriage to either the accused or the victim in this offense, Ms. Gladys Keene Nopwasky? Am I saying that correctly?

MR. EBERT: Nopwasky.

MS. ROLLISON: Nopwasky.

THE COURT: You or members of your immediate family?

MR. TSOU: (Shaking head.)

Are you related by blood or marriage, or any members of your immediate family who may be related by blood or marriage to any of the attorneys involved?

MR. TSOU: No.

THE COURT: Are you a stockholder, or have you ever been an employee or had any interest at all in the Dale City Floors business in Ashdale Plaza?

MR. TSOU: (Shaking head.)

THE COURT: Are you a friend, client, or have you previously been a friend or client of either the Commonwealth's Attorney, or Mr. Ryland, or either one of [23] the Defense counsels, Ms. Rollison or Mr. Fahy?

MR. TSOU: I don't believe so.

THE COURT: Do you have any interest in the outcome of the case?

MR. TSOU: No.

THE COURT: Are you sensible of any bias or prejudice against either the Commonwealth or the accused?

MR. TSOU: (Shaking head.)

THE COURT: This case is one involving capital punishment. The Jury may have to consider capital punishment.

Do you have any opinion such as to prevent your convicting anyone of the offense punishable with death?

MR. TSOU: (Shaking head.)

THE COURT: Could you never vote to impose a death penalty, or would you refuse to even consider the imposition of the death penalty in the event that the law and the evidence justified it?

MR. TSOU: (Shaking head.)

THE COURT: Would you refuse to impose the death penalty in other words if the law and the evidence justified it?

[24] MR. TSOU: (Shaking head.)

THE COURT: If you were sitting as a Juror in this case and the Defendant is convicted of capital murder, could you consider voting for a sentence of less than the death penalty, in other words, life imprisonment?

MR. TSOU: Yes, I—

MR. FAHY: Your Honor, I believe the Jury member was saying something. I could see his lips moving but I didn't hear what he had to say.

THE COURT: He said yes. Let's get your answer, sir.

In the event the Defendant was convicted of capital murder, could you consider voting for a sentence of less than death? The answer is?

MR. TSOU: Yes.

THE COURT: Are you able to accept the premise of law that a person is innocent until proven guilty, even though he has been indicted and is standing trial here today?

MR. TSOU: Yes.

THE COURT: Are you also willing to accept the law that the Commonwealth must prove the Defendant guilty beyond a reasonable doubt?

[25] MR. TSOU: (Nodding head.)

THE COURT: And the Defendant does not have to produce any evidence in his own behalf at all. Can you accept that premise?

MR. TSOU: (Nodding head.)

THE COURT: Have you acquired any information about the alleged offense or the accused from the news media or from any source whatsoever?

MR. TSOU: No. I talked to somebody this last Sunday who said there was a murder trial or something on.

THE COURT: Is that the only information?

MR. TSOU: Yes.

THE COURT: Would the information you have acquired affect your impartiality in this case?

MR. TSOU: No.

THE COURT: Have you expressed or formed an opinion of your own as to the guilt or innocence of the accused?

MR. TSOU: (Shaking head.)

THE COURT: Considering what you heard, or read, or what you've just spoken of, can you take a seat in the Jury box with an open mind and wait until the entire case has been presented, and reach a fixed opinion [26] or conclusion as to the guilt or innocence of the accused based upon the law and the evidence?

MR. TSOU: Yes. I believe I can.

THE COURT: Is there anyone who knows of any reason whatsoever why you should not sit here and be a Juror on this panel today?

THE JURY PANEL: (No response.)

THE COURT: Let me say at this point that it is anticipated this case may go for as much as the remainder of this week, several days.

Does that create any undue hardship, unreasonable hardship upon any individual?

JURORS: (Indicating).

The gentleman back here first. Your name, sir?

MR. DAILEY: Gregory Dailey.

THE COURT: Mr. Dailey and Ms. Deiotte.

Mr. Dailey, is that because of some prior commitments, or what is the hardship?

MR. DAILEY: Because of the work I'm into. I'm doing telephone communications, and the company that I work for is very small and it would jeopardize their business right now. I'm trying to work on the business—

[27] THE COURT: That company will never be a party to a litigation like this I'm sure, but at the same time they may be involved in cases in which they need Jurors.

And under the circumstances that would have to be something that we would not be able to excuse you from.

MR. DAILEY: I understand.

THE COURT: Anyone else? Now, Ms. Deiotte.

MS. DEIOTTE: I have a two person business, which is a newspaper. The newspaper is due to go to the printer on Thursday.

My other person just had a baby two weeks ago, so she's not working. I have somebody part time in the office and that's it.

If I had to serve all week I couldn't get my paper out, and I'm the sole support of my family.

It really will create a hardship if I have to serve all week.

THE COURT: Ms. Deiotte, you've been around the Courtroom for a long time. I suspect that you know what the answer is to that question.

MS. DEIOTTE: (Nodding head.)

THE COURT: She nods in the affirmative, but you must know—

[28] MS. DEIOTTE: Well, I do think it's a freedom of press issue, also.

THE COURT: Well, it may well be, but I take an oath to uphold the laws of the Constitution of the United States and the laws of Virginia.

As you well know, they have really restricted us as to who is to be exempt from it nowadays.

This case is that important, and under the circumstances I would have to deny you.

We have given you an opportunity to say so, both of you, but as you all know, eventually this Jury panel is going to be brought down to fourteen, and I have twenty-six in there now.

So you can figure out that there are some people who are going to have to leave by the usual method of strikes.

And I will tell you that that's going to take place as soon as we get our fair and impartial panel.

Is there anyone else who would find any hardship in that regard?

THE JURY PANEL: (No response.)

THE COURT: I will also tell you that I plan to run hopefully from 9:30 in the mornings until [29] approximately 5:00 o'clock, depending on a good convenient time to break at that time of the evening.

Does that cause you any problem?

And I will say to you up front that we do give you an opportunity late in the evening if it does appear that there's going to be some additional time or run over to make appropriate telephone calls during the course of the recess.

THE JURY PANEL: (No response.)

THE COURT: Is there anyone of you who has any hearing impairment?

THE JURY PANEL: (No response.)

THE COURT: Is there anyone who does not understand the English language?

THE JURY PANEL: (No response.)

THE COURT: One further question from me, and it's a repeat.

Is there anyone who for any reason whatsoever, other than those that have been stated, why they should not sit here and be a Juror on this Jury today should you be one that was selected by virtue of the fact that you were not eliminated?

THE JURY PANEL: (No response.)

[30] THE COURT: Does the Commonwealth Attorney's office have any questions?

MR. EBERT: Your Honor, two members of the Panel indicated that they could not impose the death penalty.

I think as a matter of law they ought to be excused and someone take their place, Ms. Felmley and I think Mr.—

THE COURT: They haven't said—in answer to my follow up questions they didn't say that they could not. We'll have to bring them back in.

MR. EBERT: If that's the case, I just have a few questions.

THE COURT: All right.

MR. EBERT: Ladies and gentlemen, as the Court has told you I am Paul Ebert.

I'm fighting a cold and a sore throat, so that will probably benefit you. I might not be able to talk too much. But if you'll bear with me if I run out of voice during the course of this.

I just have several questions of you. There may be—let me ask one other question first.

Is there a Mrs. Shipp on the panel? I guess [31] not. I was going to ask for information. All right.

Would the fact that the Commonwealth under the law does not have to prove a motive, although the evidence may indicate a motive—would that have any bearing on your ability to determine guilt or innocence assuming that you were not satisfied that there was a motive?

THE JURY PANEL: (No response.)

MR. EBERT: There may be psychiatric testimony in this trial. Could you view that testimony in light of all the evidence in your own common experience and accept that testimony in conjunction with the other testimony?

THE JURY PANEL: (No response.)

MR. EBERT: Is there any person on the panel that could not do that or any person who would accept the so-called expert testimony simply because it came from an expert and not consider all the evidence in addition thereto?

THE JURY PANEL: (No response.)

MR. EBERT: I think the Court has told you, you're all aware that this case involves a charge which may be punished by death.

The Court has asked you this question, and I'm going to ask you this again.

[32] Is there any member of the panel that could not consider, if the law and circumstances justified the same, imposing death in this case?

MS. FELMLEY: (Indicating.)
MR. SUTER: (Indicating.)
MR. EBERT: Is there any member of the panel, if the law and evidence justified, you could not impose life in this case?
THE JURY PANEL: (No response.)
MR. EBERT: The last question I want to ask you, would anyone have a philosophical, moral, religious, or any other reason—I think other than you two persons, Ms. Felmley and Mr. Suter—that would prohibit you from imposing the death penalty?
THE JURY PANEL: (No response.)
MR. EBERT: Your Honor, other than the two that indicated they could not abide under the circumstances, I have no objection to any of the panel.
And I think they should be excused for cause in accordance with the Witherspoon case.
THE COURT: Mr. Fahy.
MR. FAHY: Your Honor, a point of clarification. I understand the Court will still go [33] through panels of four.
THE COURT: That's correct.
MR. FAHY: We wish to ask questions of the two individuals in question, and we would ask—
THE COURT: I'm going to give you that opportunity.
MR. FAHY: —if we can't do that of the panel?
THE COURT: I'm going to give you that opportunity. That's the reason I'm asking them to answer yes or no only.
You'll have an opportunity to elaborate on it.
Questions for the Defense for the entire panel?
MS. ROLLISON: Good morning again, ladies and gentlemen. My name is Lawrie Rollison, and I have one question for the entire panel.
Are any of you related to or acquainted with any of the following individuals who may be called as witnesses by the prosecution in this case?

I'm going to read out a list of names. If you recognize a name, would you please raise your hand.
Morrell Woods.
[34] THE JURY PANEL: (No response.)
MS. ROLLISON: Sergeant Ronald Henderson.
THE JURY PANEL: (No response.)
MS. ROLLISON: Billy Newman.
THE JURY PANEL: (No response.)
MS. ROLLISON: Joseph Clyburn.
THE JURY PANEL: (No response.)
MS. ROLLISON: Steve Kersse.
THE JURY PANEL: (No response.)
MS. ROLLISON: Michael Grimm.
THE JURY PANEL: (No response.)
MS. ROLLISON: Major Glenn Hill.
MS. DEIOTTE: (Indicating.)
MS. ROLLISON: Norman Dodson.
THE COURT: One lady, Ms. Deiotte, knows Major Hill.
MS. ROLLISON: Thank you. Do you know Major Hill?
MS. DEIOTTE: (Nodding head.)
MS. ROLLISON: Emmitt Cook.
THE JURY PANEL: (No response.)
MS. ROLLISON: Alda Kelly.
THE JURY PANEL: (No response.)
[35] MS. ROLLISON: Bert Hillmar.
THE JURY PANEL: (No response.)
MS. ROLLISON: Gail Miller.
THE JURY PANEL: (No response.)
MS. ROLLISON: Kenneth Moore.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.H. Anderson.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.W. Dury.
THE JURY PANEL: (No response.)
MS. ROLLISON: Rose Marie Anderson.
THE JURY PANEL: (No response.)

MS. ROLLISON: George Terry.
THE JURY PANEL: (No response.)
MS. ROLLISON: Warren Whitley.
THE JURY PANEL: (No response.)
MS. ROLLISON: Trooper Dunham.
MR. TSOU: Did you say Kenneth Moore?
MS. ROLLISON: Kenneth Moore.
MR. TSOU: I know a Kenneth Moore. I work with a Ken Moore.
MS. ROLLISON: Frances Fields.
THE JURY PANEL: (No response.)
[36] MS. ROLLISON: Michael Lawson.
THE JURY PANEL: (No response.)
MS. ROLLISON: Zeta Wade.
THE JURY PANEL: (No response.)
MS. ROLLISON: George Stephens.
THE JURY PANEL: (No response.)
MS. ROLLISON: Z.D. Ijams. I may be mispronouncing that.
THE JURY PANEL: (No response.)
MS. ROLLISON: Frank Saunders.
THE JURY PANEL: (No response.)
MS. ROLLISON: L.W. Lawson.
MS. FELMLEY: I know Mr. Lawson.
MS. ROLLISON: Your name, please?
MS. FELMLEY: Martha Felmley.
MS. ROLLISON: R.A. Kline.
THE JURY PANEL: (No response.)
MS. ROLLISON: Sergeant Harold McDowell.
THE JURY PANEL: (No response.)
MS. ROLLISON: Michael Gray.
THE JURY PANEL: (No response.)
MS. ROLLISON: Keith Shifflett.
THE JURY PANEL: (No response.)
[37] MS. ROLLISON: J.J. Mason.
THE JURY PANEL: (No response.)
MS. ROLLISON: Paul X. Bolt.

THE JURY PANEL: (No response.)
MS. ROLLISON: Kenneth Rainey.
THE JURY PANEL: (No response.)
MS. ROLLISON: Allen Douglas.
THE JURY PANEL: (No response.)
MS. ROLLISON: Paul Fair.
THE JURY PANEL: (No response.)
MS. ROLLISON: Gloria Washington.
THE JURY PANEL: (No response.)
MS. ROLLISON: Kevin Boxley.
THE JURY PANEL: (No response.)
MS. ROLLISON: Richard Harris.
THE JURY PANEL: (No response.)
MS. ROLLISON: Robert Owens.
THE JURY PANEL: (No response.)
MS. ROLLISON: David Watson.
MS. DEIOTTE: I know him.
MS. ROLLISON: Kenneth Woods.
THE JURY PANEL: (No response.)
MS. ROLLISON: R. Phillips.
[38] MS. WALTERS: (Indicating.)
MS. ROLLISON: J. Hamilton.
THE JURY PANEL: (No response.)
THE COURT: Excuse me. There's one lady over there.
MS. ROLLISON: Oh, yes, ma'am.
MS. WALTERS: R. Phillips.
MS. ROLLISON: Your name, please.
MS. WALTERS: Sheila Walters.
MS. ROLLISON: R.C. Zinn.
THE JURY PANEL: (No response.)
MS. ROLLISON: S.S. Lanham.
THE JURY PANEL: (No response.)
MS. ROLLISON: H.I. Dulaney.
THE JURY PANEL: (No response.)
MS. ROLLISON: W. Cox.
THE JURY PANEL: (No response.)

MS. ROLLISON: J.R. Fry.
MS. DEIOTTE: Fry.
MS. ROLLISON: R.A. Cantarella.
MS. DEIOTTE: Fry.
MS. ROLLISON: That's Ms. Deiotte again.
Thank you so much.

[39] MR. FAHY: Your Honor, may I confer with counsel very briefly?

THE COURT: You may, sir.

(Ms. Rollison and Mr. Fahy conferred, off the record.)

MS. ROLLISON: To those of you who have indicated that you've known one of the persons that I've read off, would the fact that you know them or are acquainted with them affect your impartiality in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Has any one of you patronized Dale City Floors?

MS. SANTIAGO: I have.

MS. ROLLISON: Mrs. Santiago.

MR. FAHY: What's her name?

MS. ROLLISON: Mrs. Santiago.
Do any of you live—oh, pardon me.

MR. LAYTON: I've been there but I've never purchased anything. My name is Michael Layton.

MS. DEIOTTE: Ms. Nopwasky was a client of mine. I haven't been in the store but I've talked to her on the phone.

[40] MS. ROLLISON: Anyone else?

MR. RISH: I've been in the store.

MS. ROLLISON: Yes, sir. You've been in the store before? And your name, sir.

MR. RISH: Rish.

MR. FAHY: I didn't hear the name.

MR. RISH: Barney Rish.

MR. Fahy: Thank you.

MS. ROLLISON: Do any of you live within a mile of Ashdale Plaza, and that's located on the eastern end of Prince William County in the Woodbridge/Dale City area?

MR. BOOTHE: I live on Cloverdale. My name is Boothe. I think I'm within a mile.

MR. MERRITT: I live on Dillon Avenue, within a mile.

MR. RISH: Possibly on the far end.

THE COURT: Another one.

MS. WOLFE: I don't know how far. I'm in the Hillendale section.

MS. ROLLISON: All right. I'm familiar with that area.

MR. FAHY: Your name, ma'am?

[41] MS. WOLFE: Rita Wolfe.

MS. SANTIAGO: I live on Mapledale.

MS. ROLLISON: Anyone else?

MS. DERE: (Indicating.)

MS. ROLLISON: Yes, ma'am.

MS. DERE: I live in the Glendale section.

MS. ROLLISON: Your name, please.

MS. DERE: Marlene Dere.

MR. FAHY: I'm sorry. I've got a hearing problem. Could you repeat that.

(Laughter.)

MS. DERE: My name is Dere, D-E-R-E.

MR. FAHY: Thank you.

MS. HAINES: Do you want to know everybody in Dale City?

MS. ROLLISON: No, just—so you're in Dale City as well.

THE COURT: The question is anyone that thinks you live within a mile of Ashdale Plaza.

MS. ROLLISON: Did any of you attend any campaign meetings or rallies for Mr. Paul Ebert?

MS. DEIOTTE: (Indicating.)

MS. ROLLISON: Mrs. Deiotte.

[42] Did any of you participate in or contribute to any of the election campaigns for Mr. Paul Ebert for Commonwealth's Attorney?

MR. FAHY: I thought I saw a hand in the back, Your Honor. Maybe I didn't.

May I confer with counsel again just very briefly?

THE COURT: Yes. As a matter of fact, I'll permit you to stand there with her.

(Laughter.)

(Mr. Fahy and Ms. Rollison conferred, off the record.)

MS. ROLLISON: Let me back up a bit. My counsel has reminded me of something I forgot to ask.

Does the fact that you all live close to Ashdale Plaza, within one mile, would that affect your ability to judge this case impartially?

THE JURY PANEL: (No response.)

MS. ROLLISON: Mrs. Deiotte, the fact that you participated in the campaign for Paul Ebert, would that affect your impartiality in this matter?

MS. DEIOTTE: That wasn't really the question that was asked. You asked if I had attended, and I [43] attended as a news reporter.

MS. ROLLISON: If you had attended. The fact that you had attended, would that affect your impartiality?

MS. DEIOTTE: No. I don't believe so.

MS. ROLLISON: Are any of you currently a law enforcement officer, or do any of you have law enforcement officers as members of your immediate family or as close friends?

JURORS: (Indicating.)

MS. ROLLISON: Yes. Let's start on this end. Mrs. Haines.

MS. HAINES: My father is a SAC at the FBI, and I work for Criminal Investigations.

MS. ROLLISON: Yes.

MS. SANTIAGO: My husband is Secret Service.

MS. ROLLISON: Your name?

MS. SANTIAGO: Mrs. Santiago.

MS. WALTERS: My name is Sheila Walters and my husband is employed by the U.S. Park Police and—

MR. FAHY: Is that Ms. Wolfe?

MS. ROLLISON: That's Ms. Walters.

MR. FAHY: Walters.

[44] MS. BREWER: Helen Brewer. My girlfriend's son is a policeman.

MR. RISH: My son's friend is a Prince William police officer.

MS. DAME: My husband is Secret Service, Dame.

MS. DEIOTTE: I'm a former Policeman Courts Reporter and I have lots of friends at the Police Department.

MS. ROLLISON: Okay. Did I miss anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would the fact that you all know or may be related or acquainted with police officers, would that affect your impartiality in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Do any of you believe that the testimony of a police officer or investigator carries more weight than the testimony of an ordinary citizen witness?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you appeared as a witness for the Prosecution in a criminal case?

MS DEIOTTE: I have.

MR. STREET: Can I ask a question?

MS. ROLLISON: Yes.

[45] MR. STREET: I was subpoenaed but I never did, you know—

MS. ROLLISON: It was for a criminal matter?

MR. STREET: Yes. It was a—a kid was selling—was reimbursing auto parts and I happened to buy an auto parts from that place. But nothing—you know, I never did have to say anything.

MR. MARTIN: (Indicating.)

MS. ROLLISON: Yes, sir.

MR. MARTIN: I may have. I'm not sure. I was in a Maryland case. I don't know if that's criminal or not.

MS. ROLLISON: Okay. Your name.

MR. MARTIN: William Martin.

MS. ROLLISON: For those of—yes, sir.

MR. LAYTON: I also was subpoenaed when I used to do work in a store and a bad check was passed. I'm not sure if that's any criminal, but I never testified in the Court. They settled it out of Court.

MS. ROLLISON: Anyone else?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would the fact that you all may have been subpoenaed or called as a witness, or testified [46] or not testified as the case may be in a criminal matter, would that affect your ability to render an impartial verdict in this matter?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you served on a Jury before?

THE JURISTS: (Indicating.)

MS. ROLLISON: Your names.

MS. BREWER: Yes. Two and a half years ago I served on two different cases.

MR. FAHY: Your name, please.

MS. BREWER: Helen Brewer.

MS. DAME: Sandra Dame. About five or six years ago.

MS. THORPE: Evelyn Thorpe. About five or six years ago.

MS. ROLLISON: Can you speak up just a little bit. I'm having a hard time—

MS. THORPE: Evelyn Thorpe.

THE COURT: Ms. Thorpe. Five or six years ago.

MS. ROLLISON: Yes, ma'am.

MS. FELMLEY: I served on Grand Jury.

[47] MS. SANTIAGO: I served, but it was not here, in New York City, and you just, you know, phone in, but they told me they didn't need me.

MS. ROLLISON: Yes, sir.

MR. MERRITT: I've served on a number of military court martials.

MS. ROLLISON: Does the fact that you may or may not have served on a Jury before, would that affect your ability to render an impartial verdict in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: For those of you who answered in the affirmative—well, skip that.

Have you or any of your family members been a victim of a crime?

MS. DEIOTTE: Yes. My mother.

MS. ROLLISON: Ms. Deiotte. Yes, sir.

MR. LAYTON: I've been robbed a couple of times.

MS. ROLLISON: Your name again.

MR. LAYTON: Michael Layton.

MS. ROLLISON: Would the fact that you all have been a victim of crimes, would that affect your ability to be impartial in this matter?

[48] THE JURISTS: (Shaking heads.)

MR. FAHY: Could I speak with Ms. Rollison one more time.

(Mr. Fahy and Ms. Rollison conferred, off the record.)

MS. ROLLISON: Thank you.

Do any of you all have friends or neighbors that have been victims of violent crimes such as rape, robbery, murder, or assault and battery?

THE JURISTS: (Indicating.)

MS. ROLLISON: Ms. Walters.

MS. WALTERS: (Nodding head.)

MS. DEIOTTE: Rape and murder.

MS. ROLLISON: Would the fact that your friends have been victims of a violent crime affect your impartiality in this matter?

MS. WALTERS: (Shaking head.)

MS. DEIOTTE: (Shaking head.)

MS. ROLLISON: Are any of you opposed to the Islamic religion?

MS. HAINES: Yes.

MS. ROLLISON: Ms. Haines.

MS. HAINES: (Nodding head.)

[49] MS. ROLLISON: Thank you.

Ms. Haines, the fact that you're opposed to the Islamic religion, would that cause you to have a problem with rendering a fair and impartial verdict in this matter?

MS. HAINES: I'd have to know the facts first, the facts of the case.

MS. ROLLISON: Well, you're—

MS. HAINES: No. No, to answer your question.

MS. ROLLISON: Thank you.

THE COURT: I presume that those other questions which the Court has approved, you wish to take up in the limited sessions?

MS. ROLLISON: Yes, Your Honor.

THE COURT: At this particular time, ladies and gentlemen, I'm going to ask my Bailiff to take you back to Jury rooms in the back.

I'm going to ask you not to discuss what we've done thus far, anything relevant to this case whatsoever.

I'm going to be bringing you back in groups of four, in which there will be more specific questions asked by counsel concerning some of the answers you have thus [50] far given.

Then when we get through those specific questions, we'll send those persons back to still another room. I hope we've got enough rooms back here to keep everybody separated.

(Laughter.)

We have two other Juries in addition to this one, so we are cramped on space, but my Bailiff will be able to work it out.

I assure you and I admonish you that we cannot tolerate any conversation among yourselves or with anyone else concerning the questions you thus far have been asked nor anything about the case, the nature of the case or what we're doing here today.

It's very, very important that we keep an open mind and at all times remain free of any outside influence that may in any way, shape, or form have any influence on your ultimate decision.

So with that in mind I'm going to ask the Bailiff to take you back. Then I'm going to ask for the first four. My Clerk will tell him what four we want to bring back.

The persons who are spares, you will remain [51] seated on the front row.

You're doing a good job of paying attention to the questions that are being asked. It will shorten the process if we have to ask you questions.

(Whereupon, at approximately 11:19 o'clock a.m., the Jury panel retired from the Courtroom.)

MR. FAHY: Your Honor, I have a motion at this time if I may.

THE COURT: All right. State your motion.

MR. FAHY: Your Honor, I would move to—

THE COURT: Excuse me just a second. We still have a Jury panel in here.

I'm sorry, but the motion being a little bit unusual, I'm going to have to ask the panel to go out also, the ten extra persons who are panel members. So if you will come in this direction.

Take them down the hall and please put them in a Jury room separate from the others.

(Whereupon, at approximately 11:20 o'clock, the Jury panel alternates retired from the Courtroom.)

THE COURT: All right, Mr. Fahy.

MR. FAHY: Your Honor, I would move to strike for cause all the persons who indicated in the affirmative [52] they had acquired information about this case.

The list as I noted it was Merritt, Boothe, Runion, Layton, Walters, Taylor, Haines, Syphrett I think it is, Suter, Wolfe, Thorpe, Forehand, Felmley, Dillon, Dame, Deiotte, and Paul Tsou, T-S-O-U.

My argument is simply this. All of those individuals indicated that they had information about this case.

Your Honor has previously heard our argument in support of asking these people under 8.01-358 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, on that authority we had requested to ask these people what it is they know specifically under that Code section and under those Constitutional Amendments.

That request having been denied, we are in a position where they have answered that question in the affirmative, they have also answered Your Honor's question to the effect that they can make an impartial decision in essence, words to that effect.

But we submit under the authority that we have cited that that's insufficient, and we would ask that all of those people be struck for cause.

[53] THE COURT: All right. Mr. Ebert, do you wish to be heard?

MR. EBERT: If it please the Court, it's clear under the law that the test is not whether or not they have heard it. The question is whether or not they can put that aside and render a fair and impartial verdict.

And that they have done.

It's not necessary that people live in a vacuum. As long as they can be fair and impartial, that's all the Court should require, and of course the Court's standard instruction is to that effect.

And quite frankly not to hear what goes on in society for a panel this large would be very unusual.

Based on that, I would ask the Court to deny that motion.

THE COURT: All right. Your motion is denied. We're going to bring these persons back and we're going to give you an opportunity to go into it to learn more about what they may have known or whether or not they can reach a fair and impartial verdict.

At this time for that reason I'm going to deny your motion.

MR. EBERT: If it please the Court I have— [54] do you have any further motions, counsel?

MR. FAHY: We had one other motion. Ms. Rollison has it.

MS. ROLLISON: At this time I would like to renew my motion for a change of venire or venue.

I'm bringing it up at this point in the trial. We have had part of the selection of the Jurors. Many of them have indicated that they have read publicity.

I would like to submit as a Defense exhibit some more paper articles that have come out since the time that we were in Court last.

(Ms. Rollison handed a document to the Court for his examination.)

As the Court can see, the lengthy publicity continues. This case has been covered.

You know, taking each article separately obviously they're not going to show a whole lot of publicity.

But taken as a whole, the cases I've cited earlier in my prior motion, I wish to incorporate them here, and I also wish to add as authority for this motion the Sixth, Eighth, and Fourteenth Amendment of the U.S. Constitution.

[55] Inasmuch as the Sixth Amendment promises impartial Jury and effective assistance of counsel, we think that the impartiality of these Juries is preeminent in a trial of this type.

The Eighth Amendment as well, we feel states that—particularly in a death case—that impartiality is heightened. It's absolutely necessary in a case at this point.

The Fourteenth Amendment obviously is due process.

All these newspaper articles, some of these Jurists have indicated that they may or may not have seen.

We don't know what they've seen. We're not going to be allowed to inquire as to what they have seen or what they have heard.

We believe that that is also violative of the Sixth, Eighth, and Fourteenth Amendment as per Mr. Fahy's earlier motion.

At this time I would like to call Mark Woolverton to the stand.

THE COURT: Wait just a second. You're not going to call him to the stand yet. The Commonwealth is going to have the opportunity to say something.

[56] MS. ROLLISON: That's correct.

THE COURT: Mr. Ebert.

MR. EBERT: If it please the Court, I think there's nothing before the Court at this time to indicate that we would not be able to get a fair and impartial panel.

As a matter of fact, to the contrary, very few people had indicated—I guess none of them really indicated at this stage, with the exception of one person and he even didn't disqualify himself on that basis.

So I would submit to the Court that the motion should be denied at this time.

THE COURT: Proffer what your witness would say.

MS. ROLLISON: Mr. Woolverton is the Police Department spokesperson. On or about December 17th, 1988, an alleged incident occurred at the local Prince William County Jail.

Mr. Woolverton over his objections made statements to the press regarding Mr. Mu'Min's involvement.

He would state I believe that he was directed to make those statements that he did not think he should [57] make by the Commonwealth Attorney's office.

THE COURT: The testimony at this time would be denied you. The motion would be denied.

We've been through the whole thing, Ms. Rollison, and the panel is surprisingly as free as it is. To be as free of publicity, I think sometimes media people think that their stories get a whole lot more publicity than so.

But no one presupposes that this country lives in a vacuum and doesn't read or hear some news.

The question is whether or not they can sit here and listen to this case, and decide the case based upon the law and the evidence, and that evidence being what they get in this Courtroom.

And they've all answered that if we're to believe their oaths, and we have no reason not to believe them.

For those reasons your motion is denied.

* * * *

[59] MR. EBERT: Your Honor, with regard to the questions, are we going to be limited to—

THE COURT: We're going to have to play it by ear.

MR. EBERT: publicity or go into other matters? I've asked all the questions I have.

THE COURT: Well, I think the Defense asked all the questions they wanted to ask, too. Is that right?

MS. ROLLISON: No, Your Honor.

MR. FAHY: I understand you to say that we will be able to ask them what it is they've heard. Am I—

THE COURT: Well, we're going to go into the media.

Have you asked all questions concerning everything?

MS. ROLLISON: No.

THE COURT: Well, I thought that's what you were up there for, Ms. Rollison.

* * * *

[63] A JURIST: I guess I did discuss the case when I read the newspaper with my wife.

A JURIST: Yes.

A JURIST: The same here.

MS. ROLLISON: As a follow up to that, if so, with whom, when, and where, and what do you remember you discussed? Starting with you.

THE COURT: Excuse me. I don't think we need to go into what these gentlemen may have discussed with their wife in this case.

The question is whether or not they have as a result of the discussion formed an opinion.

A JURIST: No opinion.

A JURIST: No opinion.

THE COURT: And the other follow up question is as a result of that, are you sensible of any bias or prejudice.

Then the third would be whether or not they can reach a fair and impartial verdict considering what they have discussed, et cetera.

Ms. Rollison, if you wish to ask those questions.

[64] MS. ROLLISON: You've heard them from the Judge.

THE COURT: Let me ask you this. As a result of the discussion of what you've heard, read, or whatever source, have you formed an opinion?

A JURIST: No, sir.

A JURIST: No, sir.

THE COURT: Have the discussions caused you to have any bias or prejudice in any way?

A JURIST: No, sir.

A JURIST: No.

THE COURT: Considering what you have heard, or read, and discussed in this case, can you take a seat in the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to guilt or innocence?

A JUROR: Yes, sir.

THE COURT: In other words, can you go into this case with an open mind and try the case based upon the law and the evidence, the law being what I tell you is the law, the evidence being that which you hear from the mouths of the witnesses and any documentary evidence?

A JUROR: Yes, sir.

[65] THE COURT: Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

THE COURT: Now go ahead, Ms. Rollison.

MR. FAHY: Your Honor, I would just like a point of clarification. I understand from Your Honor's questions that we are prohibited from asking specifically what it is they've heard.

THE COURT: Mr. Fahy, I'm not going to make this Jury or any other until I hear the Supreme Court tell me that I've got to delve into what man and wife speak of in the confines of their home. I think it's absurd.

MR. FAHY: I just wanted to clarify.

THE COURT: For that reason, the question is whether or not what they've heard, and they don't have to divulge it, but has that caused them to reach a bias, or prejudice, or fixation so that they cannot be fair and impartial.

That's the question.

MR. FAHY: I don't mean to belabor the point, but we would note our exception for the previous—

THE COURT: Your exception is duly noted.

* * * *

[69] MS. ROLLISON: Have you discussed this case with anyone?

MS. WALTERS: I discussed it with my Lieutenant. She lived on the same block as the victim.

MS. ROLLISON: The fact that you discussed this case with your Lieutenant, has that caused you to have an opinion in this matter?

MS. WALTERS: No.

MS. ROLLISON: Are you sensible of any bias or prejudice because of that discussion?

MS. WALTERS: Not consciously.

MS. ROLLISON: But maybe unconsciously?

MS. WALTERS: (Nodding head.)

MS. ROLLISON: Would you be able to listen to the law and the evidence as presented here today, and would you be able to follow that in light of your discussion with your Lieutenant in order to deliver a fair and impartial verdict in this matter?

MS. WALTERS: I think so.

MS. ROLLISON: So you think you would be able to control your unconscious?

MS. WALTERS: Well, I would hope so. I would [70] try to—

MR. EBERT: Your Honor, I don't believe she—she said she may have some unconscious. All of us may have something unconscious. That's not really the test. It's only what we're sensible of.

THE COURT: I need to be a little more specific.

You've said you're not conscious of it, you're not sure, and those sorts of things.

MS. WALTERS: I find that very hard to say, what you can keep coming in and out of your mind on what you've had in past discussions with someone.

THE COURT: I guess it comes down to this question for you, Ms. Rollison. I'm looking right at the one that's been approved.

Considering what you've heard in your discussions in that case with your Lieutenant who lived on the street with the lady that was killed, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of this accused?

MS. WALTERS: Yes, I think so.

[71] THE COURT: Is there any question in your mind about it?

MS. WALTERS: No, sir. There's no question in my mind about it.

THE COURT: Let me say this. The Jury is going to be given—that is the ultimate Jury is going to be given an oath to try the case based upon the law and the evidence.

The law, as I said, is what I have to tell you is the law. The evidence will be what you hear. And that oath is going to be taken, so you'll be bound by that oath if you're a Juror.

With that in mind, can you reach a fair and impartial verdict based upon the law and the evidence?

MS. WALTERS: Yes, sir.

THE COURT: Are you sensible of any bias or prejudice as a result of having discussed this with a neighbor who I presume must have known the lady that was killed?

MS. WALTERS: Not as a good friend but knew who she was, yes.

THE COURT: Are you sensible of any bias or prejudice as a result of that?

[72] MS. WALTERS: No, sir.

THE COURT: All right. Go ahead, Ms. Rollison.

MS. ROLLISON: Mrs. Walters, you indicated that you were the only one of the four of you that has discussed this case with anyone else.

Did they express an opinion to you?

MS. WALTERS: No. It was just a case of she was very sorry this happened, and she knew the person.

MS. ROLLISON: Thank you.

THE COURT: All right. Thank you very much.

* * * *

[74] MS. ROLLISON: Are you all sensible of any bias or prejudice by virtue of holding or having held that type of job?

THE JURISTS: (No response.)

MS. ROLLISON: After hearing all the law and evidence that would be presented in this case, would both of

you be able to render a fair and impartial verdict in this matter?

THE JURISTS: (Nodding head.)

THE COURT: Let's put that question the other way around. Is there any one of the two of you that could not?

THE JURISTS: (No response.)

THE COURT: There's no answer. Thank you. Go ahead now with the other questions.

MS. ROLLISON: Have any of you been the victim of a racial incident involving a black person?

[75] THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations might be affected by these facts so as to create any bias or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

MS. HAINES: Before coming here today?

MS. ROLLISON: Yes.

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you've discussed this case with someone else, did they state an opinion to you?

MS. HAINES: Pardon me?

MS. ROLLISON: Did they state an opinion to you on this matter?

MS. HAINES: No.

MS. ROLLISON: Did the fact that you discussed this case cause you to form an opinion in this matter?

MS. HAINES: No.

[76] MS. ROLLISON: Are you sensible of any bias or prejudice that may have evolved from your discussions?

MS. HAINES: No prejudice, other than the ones already stated by me.

MS. ROLLISON: Going back to that, you have answered affirmatively to several questions that I asked.

You said that you're opposed to the Islamic religion; is that correct?

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you're opposed to that religion—I know I asked you this before—but do you have an opinion that those thoughts in your mind would affect this case?

Do you have an opinion on this case as a result of that?

MS. HAINES: I don't know.

MS. ROLLISON: Given your opposition to the Islamic religion, would that cause you to have any bias or prejudice in this matter?

MS. HAINES: I think that's what you just asked me. No, I don't think so.

MS. ROLLISON: After you listen to all the law and evidence in this matter would you be able to [77] render a fair and impartial verdict?

MS. HAINES: I hope to God I can.

MS. ROLLISON: Mrs. Haines, you have indicated that you are acquainted with one of the attorneys, and that attorney is me; is it not?

MS. HAINES: Yes, it is.

MS. ROLLISON: It's correct that I represented your son in criminal charges that you filed; is that correct?

MS. HAINES: That's incorrect. I personally did not file them.

MS. ROLLISON: But you did appear as a Commonwealth's witness in that matter?

MS. HAINES: Yes, I did.

MS. ROLLISON: On behalf of your husband?

MS. HAINES: And the Police Department, yes.

MS. ROLLISON: And the Police Department, right. That was in a criminal matter?

MS. HAINES: Yes.

MS. ROLLISON: Would the fact that you appeared as a Commonwealth witness, does that cause you to have an opinion in this matter?

[78] MS. HAINES: No, it doesn't.

MS. ROLLISON: Would that cause you to have any bias or prejudice in this matter?

MS. HAINES: I guess you don't know until you're tested. I can't answer that one hundred percent. I'm sorry.

MS. ROLLISON: Okay.

MS. HAINES: I hope I wouldn't. I hope my experience has taught me that I wouldn't. But I don't know that until judged.

MS. ROLLISON: Putting aside the fact that you were a Commonwealth's witness, would you be able to put that aside, listen to the evidence and the facts in this case, and render an impartial and fair verdict?

MS. HAINES: I certainly hope so. That's my job at work.

MS. ROLLISON: May I approach the Bench?

THE COURT: You may, as well as all counsel and the Defendant.

* * * *

[80] MS. ROLLISON: The fact that you know one of us, would you be able to set aside your feelings toward us either one way or the other?

MR. EBERT: Your honor, she doesn't have any bias, and I don't think she can set it aside if she doesn't have any.

THE COURT: Objection is well taken, but go ahead.

MS. ROLLISON: Whether you feel favorably or unfavorably toward one of us even though you've indicated that you have no bias or prejudice, would you be able to set aside your knowledge of that attorney and render a fair and impartial verdict in this case?

MR. EBERT: Well, Your Honor, I'm going to object to that, too. She can't set aside knowledge. We all know what we know. She said she can be fair and unbiased.

I don't think that's a proper question.

THE COURT: The question is considering what she has heard and everything, can she go into the Jury box, et cetera.

And I've said it so many times, can you reach [81] a fair and impartial verdict based upon the law and the evidence without regard to what feelings you may have toward anyone in this Courtroom?

MS. HAINES: I certainly hope so. I don't believe that counsel is on trial and I'm not here to judge counsel.

THE COURT: Thank you, ma'am.

Next question.

MS. ROLLISON: Nothing further.

THE COURT: Excuse me. That's not all. I'll pick them up for you. You're missing one about the—

MS. ROLLISON: That's correct, Your Honor.

THE COURT: All right. Go ahead.

MS. ROLLISON: Have you discussed this case—we did ask that one, Your Honor.

THE COURT: But I am not sure that some of these persons may not have read something about it. I'll give you an opportunity.

Have any of you read anything in the newspaper concerning this case at all?

MR. TAYLOR: (Indicating.)

MR. SMITH: (Indicating.)

MS. HAINES: (Indicating.)

[82] THE COURT: Now go with that.

MS. ROLLISON: On the basis of what you've read in the newspapers, have you reached an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Are any of you sensible to any bias or prejudice after what you've read in the papers in this case?

THE JURY PANEL: (No response.)

MS. ROLLISON: Would all of you be able to reach a fair and impartial verdict after reading what you've read in the papers?

MS. HAINES: No.

MS. ROLLISON: You wouldn't be able to reach a fair and impartial—

MS. HAINES: If I understood your question correctly—repeat the question.

MS. ROLLISON: Would you be able to reach a fair and impartial verdict in this case after having read what you've read in the newspapers?

MS. HAINES: Oh. I—

MR. EBERT: I don't think that's the test. The test is could they put it aside and reach a fair and [83] impartial verdict based on the evidence.

THE COURT: The law and the evidence.

MS. ROLLISON: They didn't indicate anything, sir.

THE COURT: All right. Are you satisfied, Ms. Rollison?

MS. ROLLISON: Yes, Your Honor.

MR. FAHY: Your Honor, I have a motion. Perhaps I should make it after the panel is out.

THE COURT: Not now.

MR. FAHY: Yes, sir.

THE COURT: Any other questions? Does counsel want to confer? Any other questions for this panel of four?

Thank you. You may take them out. Hold before we bring anybody else in.

(Whereupon, the four Jurors retired from the Courtroom.)

MR. FAHY: Your Honor, I would ask to strike Ms. Haines for cause.

As I recollect what she said, she indicated that she hoped that she could render an impartial decision.

[84] I believe this was in the context of having been a witness for the Commonwealth at some point.

She made statements to the effect that you don't know until you're tested, and it was her hope that she could render a fair and impartial decision.

In light of those reservations and in light of the principle of law that should there be any doubt about the

qualifications of a Juror that doubt should be resolved in favor of the Defendant, I would ask that that person, Ms. Haines, be struck for cause.

THE COURT: Would you like to be heard?

MR. EBERT: Well, she's answered I think thoroughly and completely. She did say at one point in time she hoped she could, and we all hope that we can, but she did say that she could do it, and that's all that's required.

She said even though she knew counsel, that counsel was not on trial and—I think the question came with regard to what she had heard. But she said she could put that aside and enter a fair and impartial verdict.

She said that a number of times.

I think she's entirely proper to be on the panel.

[85] THE COURT: I'm going to grant the motion. I'm going to strike her for cause because I feel as though she hasn't been as frank as she could.

She said one time she hoped she could, but she couldn't be tested, and she hoped to God she could.

So under the circumstances I'm going to cause her to step down for cause.

So what we're going to do now, gentlemen, is we'll excuse her and we'll go on with the other panel of four.

Then when we get through all the panels of four, we're going to have to start with what we need at that time additional.

MR. EBERT: For the record, would the Court note the Commonwealth's exception.

THE COURT: The Commonwealth's exception is duly noted on striking Ms. Haines.

All right. Bring in the next four and then you can take Ms. Haines out and excuse her.

(Whereupon, the next four Jurors returned to the Courtroom and resumed their seats in the Jury box.)

All right. If you'll just take a seat on the front row in the cushioned chairs.

* * * *

[87] MS. ROLLISON: Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: I believe a few of you indicated earlier that you had read some newspaper accounts or heard accounts of this case.

Can you indicate again which one of you—have you read any newspapers or any news accounts of this matter?

MR. SUTER: I've seen headlines.

MS. ROLLISON: The fact that you've seen headlines or read headlines, has that caused you to form an opinion in this matter?

MR. SUTER: No.

MS. ROLLISON: Are you sensible of any bias or prejudice that you may hold at this time in this matter?

MR. SUTER: Sensible of—I'm not sure I understand the question.

MS. ROLLISON: Do you have any bias or [88] prejudice at this time from having read the headlines?

MR. SUTER: No.

MS. ROLLISON: Mr. Dailey, you indicated that you're with a small telecommunications firm—

MR. DAILEY: Yes, ma'am.

MS. ROLLISON: —and that they would be hampered financially by your absence for this period.

MR. DAILEY: Yes, ma'am.

MS. ROLLISON: Keeping that in mind, would that have an effect on your ability to deliberate in this matter?

MR. DAILEY: I feel that it could somewhat hamper it. Probably, yes.

MS. ROLLISON: Do you feel that you would be able to take the time that you should to deliberate in this matter, or do you feel like you would be rushed?

MR. DAILEY: I feel like I would be—

MR. EBERT: I think the Court's gone into this aspect of it and—

THE COURT: I've already gone into that. Go ahead, another question, Ms. Rollison.

MS. ROLLISON: Has anyone expressed any opinion about this case to you?

[89] THE JURY PANEL: (No response.)

MS. ROLLISON: Mr. Suter, you've indicated that you possibly hold a philosophic objection or something to the death penalty.

MR. SUTER: That's correct.

MS. ROLLISON: If you were seated as a Juror in this matter and you heard all the law and the evidence, would you be able to follow the law and the evidence that you heard in this case and impose the death penalty if you felt it was merited by the law and the evidence?

MR. SUTER: It would be difficult, very difficult.

MS. ROLLISON: When you say it would be difficult, would you say that you could never?

MR. SUTER: I would say that I would have to look at guilt or innocence different than penalty. They would have—I would have to look at them separately.

MS. ROLLISON: If you believed it to be warranted by the law and the evidence, would you be able to vote for the death penalty?

Let's say you go through the whole case, you hear everything, the Judge instructs you on the law, you've heard all the evidence.

* * * *

[93] THE COURT: Let me ask a couple of questions.

You've all heard or seen—heard something about this in one way, shape, or form.

Can you go into a Jury box with an open mind, wait until the entire case has been presented before you reach a fixed opinion or conclusion as to the guilt or innocence of the accused?

Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

THE COURT: Should you reach that opinion that beyond a reasonable doubt the Defendant is guilty of capital murder, then at a later stage of the proceeding, it's my understanding, Mr. Suter, you could consider—it would be difficult, but you could consider the death penalty if the Court instructs you that was one of the options?

MR. SUTER: I have a sense of a line being drawn by—by what I read in the newspapers of when the death penalty would be applied.

* * * *

[99] MS. ROLLISON: If I might inquire, what type of law does your firm handle?

MS. FOREHAND: Oh, well, I'm under the communications and business crimes, but we handle quite a lot. It's general.

MS. ROLLISON: So it's business and communications?

MS. FOREHAND: Yes. That's what I'm under.

MS. ROLLISON: Have any of you been a victim of a racial incident involving a black person?

THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations in this matter might be affected by these facts so as to create any bias or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: I believe that some of you may [100] have indicated earlier that you have read some newspaper accountings of this matter.

THE JURY PANEL: (Nodding heads.)

MS. ROLLISON: Have the accounts that you have read caused you to form an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Do you know of any bias or prejudice in this matter as a result of having read what you've read in the papers?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Has anyone expressed an opinion about this case to you?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Thank you.

THE COURT: Considering what you have heard or read about this case, or from whatever source you may have heard anything, is there anyone that cannot enter the Jury box, take an oath as a Juror, have an open mind, wait until you hear the entire case, until the entire case has been presented before you reach a fixed opinion or conclusion as to the innocence or guilt?

Is there anyone that cannot do that?

THE JURY PANEL: (No response.)

* * * *

[102] MS. ROLLISON: Are you aware of any bias or prejudice you may have in this matter?

MS. SANTIAGO: No, I'm not.

MS. ROLLISON: Mrs. Santiago, you've indicated earlier that you have either patronized Dale City Floors—

MS. SANTIAGO: Yeah. I knew Gladys—well, not as friendly, friendly but I've gone to the store and bought a couple of things from her, and then, you know, buys and stuff, but we weren't friends. I had just seen her and knew her.

[103] MS. ROLLISON: More like casual friends?

MS. SANTIAGO: Yeah—not even that. Just—like a client, you know.

MS. ROLLISON: Would the fact that you talked with her and knew the victim in this matter cause you to form an opinion?

MS. SANTIAGO: No, ma'am.

MS. ROLLISON: Are you aware of any bias or prejudice you may have in this matter?

MS. SANTIAGO: No.

MS. ROLLISON: If you heard all the evidence and the law in this case would you be able to render a fair and impartial verdict and set aside your knowledge of Mrs. Nopwasky?

MS. SANTIAGO: Yes.

MS. ROLLISON: Have any of you been a victim of a racial incident involving a black person?

THE JURY PANEL: (No response.)

MS. ROLLISON: In this case the Defendant is black. The victim was a white female. She was found nude from the waist down.

Do any of you believe that your deliberations might be affected by these facts so as to create any bias [104] or prejudice?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have you discussed this case with anyone?

MS. FELMLEY: Yes.

MS. ROLLISON: Yes, ma'am.

MS. FLEMLEY: Yes. It was in the papers and I certainly discussed it with lots of people.

MR. RISH: Just casually.

MS. ROLLISON: Just casually?

MR. RISH: Yes.

MS. ROLLISON: To both of you, has anyone expressed an opinion about this case to you?

MS. FELMLEY: Yes.

MS. ROLLISON: Did they express an opinion in it?

MS. FELMLEY: Yes.

MS. ROLLSON: Has what you have heard or what you have discussed with people, or what you have read, caused you to have an opinion in this matter—you, yourself have an opinion?

MR. RISH: No.

MS. FELMLEY: No.

[105] MS. ROLLISON: Are you aware of any bias or prejudice that anything you've read, or heard, or discussed might have been created in you? Do you have any bias or prejudice at all?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Mrs. Felmley, you've indicated earlier that you may have a religious or philosophic objection to the death penalty.

MS. FELMLEY: Yes, I have. It's not may have. I do have. I would not—I could not serve on a Jury which would be asked to—I mean I would not vote in favor of the death penalty.

MS. ROLLISON: After hearing the law and the evidence in this case, would you be unable if you were firmly convinced that the circumstances showed, and the evidence showed, and you were given the law and you were given an option of the death penalty, would you be able to vote for death if the case warranted that?

MS. FELMLEY: (Shaking head.)

MS. ROLLISON: Would there be any—

THE COURT: Excuse me. Your answer is?

MS. FELMLEY: No.

MS. ROLLISON: Would there be any [106] circumstances under which you could see voting for imposition of the death penalty?

MS. FELMLEY: No.

MR. EBERT: Your Honor, she's answered the question she could not consider the death penalty.

THE COURT: She can answer the question.

MS. ROLLISON: Thank you.

THE COURT: Do you have any questions, Mr. Ebert?

MR. EBERT: No, sir. I don't have any questions.

THE COURT: I'm going to have to excuse the woman —your name again, please?

MS. FELMLEY: Felmley.

THE COURT: Ms. Felmley, I'm going to have to excuse you.

But for the rest of you that are there, considering what any of you may have heard, read, discussed, or from whatever source of the information you got, is there anyone who could not enter the Jury box with an open mind and wait until the entire case has been presented before reaching a fixed opinion or conclusion as to the guilt or the innocence of the accused?

[107] Is there anyone that could not do that, other than Ms. Felmley?

THE JURY PANEL: (No response.)

THE COURT: Any further questions? Thank you.

Ms. Felmley, I'm going to have to excuse you.

Please take the other three back to the Jury room.

Ms. Felmley, you're free to leave at this time.

Mr. Fulmore, be sure she goes down and leave the other Jurors in the juror assembly room.

* * * *

[111] MS. ROLLISON: As a result of that, has anyone stated an opinion to you about this case?

MS. DEIOTTE: (Nodding head.)

MS. ROLLISON: Has the fact that you've discussed this case, and I believe you indicated that some of you have read in the newspapers about this as well, does the fact that you read or discussed this case cause you to have an opinion in this matter?

THE JURY PANEL: (Shaking heads.)

MS. ROLLISON: Are you aware of any bias or prejudice you might hold after having discussed this case or read about it?

THE JURY PANEL: (Shaking heads.)

* * * *

[113] MS. ROLLISON: Does the fact that you know any of the people that will be appearing today cause you to be aware of any bias or prejudice in this matter?

Would that influence your thinking as a Juror?

(Pause.)

MS. DEIOTTE: No. Only to the extent when one has had contact with people, you know the kind of people that they are and you tend to believe or not believe them because of your previous experience.

But I think that would be true of anybody on a Jury who's lived for a while.

MS. ROLLISON: I'm trying to understand what you're saying to me.

Would the fact that someone you know is testifying—would that cause you to have sort of bias then I guess towards what they're saying, the fact that you would believe them more than any other witness, or not believe them conversely?

MS. DEIOTTE: Possibly.

MS. ROLLISON: If after hearing all the law and evidence in this case, could you take all that into [114] consideration and do you believe that you would be able to disregard your opinions of these people, what you know about them, and render a fair and impartial verdict?

MS. DEIOTTE: Yes.

MS. ROLLISON: But you do believe that your understanding of what they're saying, you might either believe or disbelieve them more or less based on your knowledge of these people's—

MS. DEIOTTE: Yes.

MS. ROLLISON: —credibility?

MS. DEIOTTE: Well, I mean one used to be my next door neighbor for Pete's sake. So if you live next door to somebody it's human nature.

MS. ROLLISON: You've indicated, Ms. Dame, that you've formed no opinions from what you've discussed with people or read in the papers?

MS. DAME: No, I haven't.

MS. ROLLISON: Thank you.

* * * *

[116] THE COURT: All right. Then considering what you've heard, read, or what you know about the case from whatever the source, do you believe that you can enter the Jury box with an open mind, wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

(Pause.)

MS. DEIOTTE: You know, I don't know. I think I could but I just can't say for sure.

THE COURT: Thank you, ma'am.

Anything further?

Thank you. You may take these two.

(Whereupon, the previous two Jurors retired from the Courtroom.)

* * * *

[130] THE COURT: Have you acquired any information about this offense or the accused from the news media or from any source, and if so, would that affect your impartiality in the case?

THE JURY PANEL: (No response.)

THE COURT: Have you acquired any information from any source?

MR. BALL: Yes, newspapers.

MS. GRIFFIN: Newspapers.

THE COURT: Whatever you've read, heard, seen, or discussed, would that information be such to affect your impartiality?

MS. GRIFFIN: No.

MR. BALL: (Shaking head.)

THE COURT: Considering what you have heard, [131] read, or seen, or heard discussed, do you believe you can enter the Jury box with an open mind and wait until the entire case has been presented before reaching a fixed opinion or conclusion as to the innocence or guilt of the accused?

MR. BALL: Yes, sir.

MS. GRIFFIN: Yes, sir.

THE COURT: Do you know of any reason whatsoever why you could not sit today and give a fair and impartial trial based on the law and the evidence?

THE JURY PANEL: (No response.)

* * * *

[139] MS. ROLLISON: Have any of you appeared as a witness for the Prosecution in a criminal cases?

THE JURY PANEL: (No response.)

MS. ROLLISON: Have any of you served on a Jury before?

MS. GRIFFIN: (Shaking head.)

MR. BALL: Yes, ma'am.

MS. ROLLISON: Would the fact that you served on a Jury before cause you to have an opinion in this case?

MR. BALL: It's a different case, different time.

MS. ROLLISON: I understand.

Do you have any bias or prejudice as a result of having sat on a Jury before?

MR. BALL: No, ma'am.

MS. ROLLISON: Would you be able in this case to hear the evidence and the law as presented and after hearing that be able to render a fair and impartial verdict?

MR. BALL: Yes, I could.

* * * *

[142] MS. ROLLISON: Are any of you opposed to the Islamic religion?

MR. BALL: I don't believe in the Islamic religion, but that has nothing to do with whether I could render a fair and impartial verdict.

MS. ROLLISON: So you could set aside your opinion concerning the Islamic religion?

MR. BALL: I don't think that is at issue here. We're not trying the case of Islam.

MS. ROLLISON: Thank you.

Have you discussed this case with anyone?

THE JURY PANEL: (No response.)

MS. ROLLISON: The Judge previously asked you if you have read newspaper accounts of this.

What you've read, or what you discussed, or what you've heard, has that caused either of you to have an opinion in this matter?

MR. BALL: No, because they were not that [143] complete.

MS. GRIFFIN: I read the newspaper a little bit and that was it.

MS. ROLLISON: So neither of you would hold a bias or prejudice for or against one way or the other?

MR. BALL: Not based on the newspaper.

MS. GRIFFIN: No.

MS. ROLLISON: Has anyone expressed an opinion about this case to you?

MR. BALL: No.

MS. GRIFFIN: No.

MS. ROLLISON: Mr. Ball, you indicated to the Judge that you had been pondering his questions about the imposition of a life sentence as opposed to the death penalty.

MR. BALL: Yes, ma'am.

MS. ROLLISON: I gather from some of the other questions that after one has found someone guilty in a case like this, that you would consider—you would certainly consider the death penalty, but you have some problems with considering the imposition of a life sentence?

MR. BALL: I have pondered that many—not [144] just since the start of the case. It really came to light when His Honor asked the question.

But I have dealt with that quite a bit myself in just thinking through what do I believe, and I see a better case for capital punishment in capital cases than I do for life imprisonment.

But then again there may be reasons not to do it and I'm willing to consider those.

MS. ROLLISON: If after hearing all the law and evidence in this case and feeling the way you do about a life sentence, assuming you have found the Defendant

guilty, would you be able to consider the imposition of a life sentence?

MR. EBERT: He's answered the question I think, Your Honor.

THE COURT: Let him answer it again. He's hesitating now.

* * * *

[150] read, or discussed from whatever source and whatever information you have, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the innocence or guilt of the accused?

THE JURY PANEL: (Nodding heads.)

THE COURT: Thank you very much. You may step down. Please take them back.

* * * *

[164] THE COURT: Have either of you acquired any information about this alleged offense or the accused from the written media, or the news, or radio, or television, or from any source whatsoever that would affect your impartiality in this case?

MR. ROSENBERGER: No.

MR. FRIEND: No.

THE COURT: In other words, have either one of you acquired any information at all concerning the accused or the offense?

MR. FRIEND: No.

MR. ROSENBERGER: (Shaking head.)

THE COURT: Have either of you expressed or formed an opinion as to the innocence of the accused or guilt of the accused?

[165] THE JURY PANEL: (Shaking heads.)

THE COURT: Have you heard the case discussed in any manner at all or stated in any manner except here today?

MR. FRIEND: No, sir.

MR. ROSENBERGER: (Shaking head.)

THE COURT: Do either one of you know of any reason whatsoever why you should not sit today and subsequent days and listen to the law and the evidence and reach a fair and impartial verdict based upon the law and the evidence?

THE JURY PANEL: (Shaking heads.)

THE COURT: As I'm told, it may go into as much as the rest of this week. Would that cause an undue hardship on either one of you if you had to sit as a Juror for the remainder of this week?

THE JURY PANEL: (Shaking heads.)

THE COURT: Do you know of any reason why you should not be here?

MR. FRIEND: No.

* * * *

SUPREME COURT OF VIRGINIA

Record No. 890899

DAWUD MAJID MU'MIN a/k/a DAVID MICHAEL ALLEN

v.

COMMONWEALTH OF VIRGINIA

March 2, 1990

Present: CARRICO, C.J., COMPTON, STEPHENSON, RUSSELL, WHITING, and HASSELL, JJ., and POFF, Senior Justice.

POFF, Senior Justice.

Dawud Majid Mu'Min, also known as David Michael Allen, was tried by a jury on an indictment charging capital murder. Invoking the three grounds defined in subsections (c), (d), and (e) of Code § 18.2-31 (Repl. Vol. 1988) (now, subsections (3), (4), and (5) of § 18.2-31), the indictment alleged that the killing had been committed while the accused "was a prisoner confined in a State or local correctional facility or while in the custody of an employee thereof, or while in the commission of robbery, while armed with a deadly weapon, or during the commission of or subsequent to rape".

The verdict form submitted to the jury in the first phase of the bifurcated trial quoted the three grounds alleged in the indictment and instructed the jury to "strike out" any ground "that you do not find beyond a reason-

able doubt." The jury marked through the third ground and returned a guilty verdict based upon the first and second grounds.

The verdict form submitted to the jury in the penalty phase of the trial quoted the language of Code § 19.2-264.4(C) defining the "dangerousness" and the "vileness" predicates and instructed the jury to strike out the language of either predicate "if either you do not unanimously find." The jury, "having considered the evidence in mitigation of the offense," returned the form unaltered and "unanimously fix[ed] . . . punishment at death." After reviewing the probation report required by Code § 19.2-264.5, the trial court entered judgment confirming the conviction and imposing the penalty fixed by the jury. We have consolidated the defendant's appeal of the conviction with the automatic review of the sentence, Code § 17-110.1(A) and (F), and accorded both priority on our docket, Code § 17-110.2.

I. THE EVIDENCE

Most of the facts and circumstances related to the attack which led to the victim's death are drawn from the defendant's testimony at trial. Convicted in 1973 of first degree murder and sentenced to a term of 48 years, the defendant was an inmate at Haymarket Field Unit #26. On the morning of September 22, 1988, he and five other prisoners were transported to the Virginia Department of Transportation's Dale City Headquarters (VDOT) where they were assigned to a work detail supervised by a VDOT employee.

During the course of his work that morning, the defendant damaged the point of a screwdriver which he repaired with the use of a bench grinder. At the same time he used the grinder to sharpen a short piece of metal (sometimes referred to as a "highway spike") into the shape of a screwdriver, added a wooden handle, and attached the device to his shirt pocket with a holder fashioned from a paper clip. When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Napwasky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued.[1] According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top of her pants" and pulled them "down right . . . by the thighs." Mrs. Napwasky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the neck." The defendant "checked her pulse to make sure she was okay", placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack along the highway. The defendant testified that he had not raped his victim.

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[1] Other evidence showed, however, that Dale City Floors had not stocked oriental carpets for eleven years.

A customer of the carpet store found Mrs. Napwasky lying on the floor and called a rescue squad. A paramedic testified that he had found her "face up on her back on the floor in a pool of blood that was around her head and upper body"; that she was naked below the waist and her blouse and brassiere had been pulled above her breasts; that although her heart was beating, "she was breathless and pulseless" because there was "no . . . fluid for it to actually pump." The autopsy report identified 16 cuts and puncture wounds on the face, neck, chest, and left arm. A neck wound, three inches deep, severed the jugular vein. A wound four inches deep in the left chest cavity penetrated the left lung. Evidence of numerous "blunt-force trauma injuries" was found on her face and forehead. The victim's genital area was undisturbed.

The Commonwealth introduced the testimony of several of the defendant's fellow inmates concerning his conduct following arrest. One witness testified that the defendant had fallen to his knees, crying and saying that he had killed somebody. Another said that the defendant had told him that he had murdered and robbed his victim. A third prisoner testified that the defendant had conceived an escape plan involving the use of violence. In a search of the defendant's cell while he was awaiting trial, the authorities found a piece of metal taken from a typewriter page stand and an ear bracket from a pair of spectacles. Both appeared to have been sharpened.

II. PRE-TRIAL ISSUES

A. *Constitutional Challenges*

The defendant filed a motion to dismiss the indictment on the ground that the capital murder statutes are unconstitutional. The trial court rejected the several challenges articulated in a detailed memorandum. The defendant incorporated the memorandum in his brief filed in this Court. All the arguments urged by the defendant have been considered and rejected. See the decisions cited

in *Spencer v. Commonwealth*, 238 Va. 563, 568-69, 385 S.E.2d 850, 853-54 (1989); *Watkins v. Commonwealth*, 238 Va. 341, ——, 385 S.E.2d 50, 56-7 (1989); *Buchanan v. Commonwealth*, 238 Va. 389, 412-13, 384 S.E.2d 757, 771 (1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 880, 107 L.Ed.2d 963 (1990); and *Pope v. Commonwealth*, 234 Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), *cert. denied*, 485 U.S. 1015, 108 S.Ct. 1489, 99 L.Ed.2d 716 (1988). We reaffirm our decisions in those cases.

B. *Motion to Suppress*

The trial court overruled the defendant's motion to suppress statements he had made to an officer in two interviews conducted prior to his arrest. Initially, he stated that, upon hearing a scream, he had entered the carpet store to find "a white guy" with "long blond hair" who was ""bending over" with "his pants pulled down" and a "lady . . . laying on the floor" alive but "bleeding through her mouth [and] nose". The white man fled, Mu'Min said, and the defendant "went out the [back] door." Abandoning that account later, the defendant acknowledged that he had entered the store to inquire about an oriental rug and had struck Mrs. Napwasky twice during a bitter quarrel over prices. In significant respects, Mu'Min's two statements were irreconcilably inconsistent. They were no more incriminating than his testimony at trial.

Attacking the trial court's ruling permitting selective portions of his extra-judicial statements to be read into evidence, the defendant contends that his statements were not voluntary because, he says, they were made while he was "incarcerated on a prior charge", while he "was tired and scared", and at a time when he was given no "opportunity to speak with legal counsel." He declares on brief that he "merely said what the Investigator wanted him to say in the misguided belief that the Investigator was going to help him."

> Admissibility of a defendant's statements is an issue to be decided by the [trial] court, which evaluates the credibility of the witnesses, resolves any conflicts in the testimony, and weighs the evidence as a whole. The court must decide whether the defendant knowingly and intelligently relinquished and abandoned his rights. The court's determination is a question of fact based upon the totality of the circumstances. This factual finding will not be disturbed on appeal unless plainly wrong.

Watkins v. Commonwealth, 229 Va. 469, 477, 331 S.E.2d 422, 429-30 (1985) (citations omitted), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986).

A review of the transcript of a tape recording of the testimony at the suppression hearing discloses no evidence of coercion. The two interviews were conducted at appropriate hours by a single investigator, the officer fully, definitively, and repeatedly advised Mu'Min of each of his *Miranda* rights, and the defendant expressly waived those rights.

The defendant was qualified, both by training and experience, to make a knowing and voluntary waiver. Mu'Min, a graduate of a private "prep" school, had earned a college degree in business administration and was literate in four languages. In his testimony at the suppression hearing, he acknowledged that, in response to questions propounded to him by the investigator, he had agreed that he understood each element of the *Miranda* warnings, that he knew the interviews were being recorded, and that, because he had been represented by an attorney appointed to defend him at his 1973 murder trial, he was already aware that he was entitled to the advice of counsel. Nevertheless, he readily assented to the question whether he was "willing to talk . . . without consulting a lawyer or having a lawyer present."

We hold that the record completely supports the trial court's ruling denying the defendant's motion to suppress his extra-judicial statements.

C. *Discovery*

Prior to trial, Mu'Min filed a motion to require the Commonwealth to disclose "the factual basis" for a claim of future dangerousness, one of the statutory predicates for the death penalty. Specifically, he requested detailed information concerning evidence of prior convictions, unadjudicated criminal charges, psychological evaluations, and any threatening statements made by the defendant which the Commonwealth intended to introduce at the penalty trial. Defense counsel claimed that, without such information, "the possibility arises of trial by ambush".

The trial court granted the motion, and the Commonwealth complied with the defendant's request. The Commonwealth then moved for disclosure [2] of those "facts in mitigation defendant intends to introduce at the penalty phase". The Commonwealth's Attorney explained that "we are merely asking for the same thing as defense asked of the Commonwealth". Granting the Commonwealth's motion, the court stated that the purpose of discovery is "to prevent total surprise" and that discovery "run [in] both directions".

On appeal, Mu'Min contends that the trial court infringed his due process rights by not limiting the Commonwealth's discovery rights to those granted expressly by Rule 3A:11(c) and Code § 19.2-264.3:1(D).[3] Assum-

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[2] It is of no consequence that both Mu'Min and the Commonwealth labelled their pleadings as motions for bills of particulars. The titles are irrelevant; judged by their substance, the two pleadings are motions for discovery.

[3] If Mu'Min's argument can be read as a claim to a right to surprise or "ambush" the Commonwealth, we reaffirm our recent holding that no such right exists. *Bennett v. Commonwealth*, 236

ing without deciding that, as Mu'Min argues, the trial court erred in granting the Commonwealth's motion, and assuming further that the error was not invited as the Attorney General contends, we hold that any such error was harmless beyond a reasonable doubt.[4]

The information the defendant disclosed was couched in broad generalizations. Indeed, Mu'Min's response to the discovery order contained little more-than a routine recitation of the mitigating factors enumerated in Code § 19.2-264.4(B) and a reference to a "history of psychiatric evaluations". It did not contain the names of any potential witnesses or any other evidence Mu'Min intended to offer. Moreover, the transcript of proceedings at the penalty trial shows that the Commonwealth offered no evidence to rebut the testimony Mu'Min adduced as evidence in mitigation. The defendant cannot logically claim that he was prejudiced by a pre-trial order granting the Commonwealth's discovery motion when his response disclosed nothing which gave the Commonwealth an unfair advantage at trial.

D. *Jury Selection*

1. Content Questions

In advance of trial, defense counsel submitted for approval a list of questions designed, in part, to determine what a prospective juror had seen, read, or heard about the case. Such questions are of a type characterized at bar as "content questions". The trial court refused to allow counsel to propound such questions, and Mu'Min

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Va. 448, 459, 374 S.E.2d 303, 311 (1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989).

[4] Although a mere violation of Rule 3A:11(c) or Code § 19.2-264.3:1(D) would not require this "more stringent standard" of harmless error review, *see Dowling v. United States*, —— U.S. ——, ——, 110 S.Ct. 668, 671, 107 L.Ed.2d 708 (1990), we have applied that standard here because Mu'Min frames the issue in constitutional terms.

argues on appeal that the court's refusal constituted "a denial of due process of law" and a violation of his right to "trial by an impartial jury".[5]

Sixteen of the 20 members of the jury panel had indicated on *voir dire* that they had acquired some information from the news media or from conversations with acquaintances. In reply to questions propounded, both by the court and by counsel during the course of an examination that consumed 172 pages of the transcript, all members of the panel attested, collectively and in groups of four, that they had not formed any opinion based upon the information they had acquired, were not sensible of any bias or prejudice, could enter the jury box with an open mind, and were able to render a fair and impartial verdict based upon the law and the evidence admitted at trial.

We agree with the Attorney General that an opportunity to pose the kind of "content questions" the defendant proposed is not a matter of right. *See United States v. Haldeman*, 559 F.2d 31, 67-8 (D.C. Cir. 1976) (en banc), *cert. denied*, 341 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (affirming trial court's rejection of "content questions" on *voir dire* related to pre-trial publicity). The in-

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[5] Mu'Min also argues that the court's ruling "violated the express mandate of Code § 8.01-358". The defendant refers to the second paragraph of that statute which directs "[a] juror, knowing anything relative to a fact in issue, [to] disclose the same in open court." Construing that statute, we have said:

> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum*. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine whether the parties have had sufficient opportunity to do so.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984).

formation a person acquires about a case from others may or may not prove to be the facts of the case as developed by evidence admitted at trial. Such information may or may not induce a person to form an opinion before trial. Any opinion formed before trial may or may not affect a person's ability as a juror to reach a different conclusion at trial.

Of course, parties litigant may properly inquire whether a prospective juror has acquired information about the case before trial. It does not follow that litigants have a constitutional right to know what the information is. They are entitled to know only whether the prospective juror, in reliance upon the information acquired, has formed an opinion and, if so, whether the juror can yet "stand indifferent in the cause". Code § 8.01-358; *L.E. Briley v. Commonwealth*, 222 Va. 180, 184-87, 279 S.E.2d 151, 154-55 (1981).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961) (citations omitted). Quoting and applying this rule in a later case, the Supreme Court upheld the seating of a juror who had said on *voir dire*, "My experience of [the accused] is such that right now I would find him guilty." *Murphy v. Florida*, 421 U.S. 794, 802 n. 5, 95 S.Ct. 2031, 2037 n. 5, 44 L.Ed.2d 589 (1975).

Here, none of the members seated on the panel had formed an opinion based upon the information acquired before trial, and all had affirmed on oath that they could

stand indifferent in the cause. We hold, therefore, that the trial court did not err in disallowing the content questions proposed by the defendant.

2. Seating Two Jurors

Renewing objections raised during *voir dire*, Mu'Min moved to strike two jurors for cause. On appeal, he contends that the trial court erred in overruling his motions to strike Alexandria Santiago, a prospective alternate, and Gregory Dailey. He argues that Ms. Santiago was not impartial because, he says, she "had patronized Dale City Floors" and referred during *voir dire* to Mrs. Napwasky "by her first name".

The transcript shows that Ms. Santiago had said that she "knew Gladys", that their relationship had been "friendly", but that "we weren't friends." In reply to questions put by defense counsel, she affirmed that her contacts with the victim did not "cause [her] to form an opinion", that she was not "aware of any bias or prejudice", and that she was "able to render a fair and impartial verdict and set aside [her] knowledge of Mrs. Napwasky".

Mu'Min challenges the seating of Mr. Dailey on the ground that "his deliberations would [have been] hampered and rushed by the financial hardship caused by jury service in a lengthy case." According to the record before us, Mr. Dailey made no plea of personal financial hardship. Asked what hardship his service on the jury would cause, he said, "I'm doing telephone communications, and the company I work for is very small and it would jeopardize their business right now." This, he believed, could make him feel "rushed" and "could somewhat hamper" his ability as a juror to deliberate.

Under Code § 8.01-341.2, a person's duty to serve on a jury may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." The privilege, one the statute makes available at the discretion of the trial court, is purely per-

sonal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer.

We find no merit in these assignments of error. Every question contemplated by Code § 8.01-358 and required by Rule 3A:14 was addressed to these prospective jurors by court and counsel. Every response Santiago and Dailey made fully supports the trial judge's conclusion that both were qualified to sit on the jury, and we will uphold his rulings.[6]

III. GUILT TRIAL ISSUES

A. *Evidentiary Rulings*

One of the elements of one of the forms of the offense charged in the indictment was the status of the accused at the time the offense was committed, *i.e.*, that he was then "a prisoner confined in a state or local correctional facility".[7] Code § 18.2-31(c). As proof of Mu'Min's

[6] On brief, Mu'Min also complains generally that "[t]he trial court's voir dire . . . was essentially limited to inquiry whether a juror's views [concerning capital punishment] would prevent, not substantially impair, choosing one punishment or the other." Although the defendant had raised an objection on this ground during *voir dire*, he failed to object to the seating of any juror on that ground. Applying Rule 5:25 in a similar procedural context, we have refused to consider a challenge to a death-qualifying question. "If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections." *Spencer v. Commonwealth*, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989). We apply that rule to Mu'Min's complaint.

[7] Defining this term, the trial court instructed the jury as follows:

> An inmate of a state correctional facility remains an inmate at all times until he is released from that status by the proper state authority. An inmate who escapes from custody retains the status of inmate during the entire course of such an unauthorized absence.

This is a correct statement of the law in this Commonwealth. *See Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 793-94 (1871); *see also Jefferson v. Commonwealth*, 214 Va. 747, 752, 204 S.E.2d 258, 262 (1974).

status, the Commonwealth offered in evidence at the guilt trial a copy of the order of conviction of first degree murder entered against Mu'Min in 1973. In keeping with its ruling against a motion that defense counsel had made *in limine*, the trial court admitted the order over the defendant's objection. On appeal, the defendant argues that evidence of prior crimes is inevitably prejudicial and that references the Commonwealth's Attorney made in the presence of the jury to the facts disclosed by that order compounded the prejudice. Accordingly, the defendant maintains that the trial court's rulings constituted reversible error. We do not agree.

A transcript of Mu'Min's interview with the investigator in which, eventually, he confessed his assault upon Mrs. Napwasky was read to the jury. As the following excerpt reveals, the defendant initiated several references to his prior conviction and to the sentence imposed.

> WATSON: You tried to wipe off your fingerprints?
> MU'MIN: Wipe my fingerprints off.
> WATSON: Why did you do that?
> MU'MIN: Because I'm a convicted murderer.
>
> * * * *
>
> WATSON: Why didn't you come forward with this story earlier?
> MU'MIN: Because I'm a convicted murderer.
>
> * * * *
>
> MU'MIN: I know what you're—it's the same thing back in '73. . . . When I got this murder charge I was sitting home. My aunt and my uncle both in the house, testified that I was home when a shot was fired, but because of certain physical evidence that they picked up, they had similarities and someone who said that he thought he saw me by the way some-

one walked, I've been sitting in the penitentiary since this, since this '73 incident, the last 15 years. . . .

* * * *

MU'MIN: I mean how can it—that look, you know, how can that look good for me? I'm a convicted murderer.

WATSON: Think about it.

MU'MIN: Serving a 48 year sentence.

These several references, integral parts of a confession we have found to be voluntary, were competent evidence. *See Boggs v. Commonwealth*, 229 Va. 501, 517, 331 S.E.2d 407, 419 (1985), *cert. denied* 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 347 (1986); *Bowman v. Commonwealth*, 174 Va. 461, 463, 5 S.E.2d 497, 498-99 (1939). We hold, therefore, that error, if any, resulting from the trial court's rulings concerning the 1973 order of conviction was rendered harmless by the defendant's own account of the same facts disclosed by that order. *See Schindel v. Commonwealth*, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (hearsay error rendered harmless by defendant's "own testimony corroborating the factual details").

Challenging another evidentiary ruling, Mu'Min argues that the trial court erred in excluding from the evidence a copy of a VDOT departmental regulation. The defendant offered the document to show that a VDOT employee assigned to supervise his work crew had not taken an oath as a peace officer as required by the regulation and, hence, that at the time the victim was killed, he was not "a prisoner . . . in the custody of an employee [of a correctional facility]" within the contemplation of Code § 18.2-31(c).

We need not consider this issue. The jury finding in the language of § 18.2-31(c) was only one of the bases for the guilty verdict. The jury also rested its verdict

upon its finding in the language of § 18.2-31(d) that Mu'Min committed the killing "during the commission of robbery while . . . armed with a deadly weapon." Consequently, the issue raised on appeal is moot. *Cf. Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (death penalty upheld although one of three statutory aggravating circumstances subsequently declared invalid); *accord Poyner v. Commonwealth*, 229 Va. 401, 427, 329 S.E.2d 815, 830, *cert. denied*, 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 178 (1985); *Tuggle v. Commonwealth*, 230 Va. 99, 110, 334 S.E.2d 838, 845 (1985), *cert. denied* 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986); *Stout v. Commonwealth*, 237 Va. 126, 134, 376 S.E.2d 288, 292, *cert. denied*, —— U.S. ——, 109 S.Ct. 3263, 106 L.Ed.2d 609 (1989).

B. *Jury Instructions*

The defendant assigns error to the trial judge's rulings refusing four instructions relating to Mu'Min's contention that he was not a prisoner within the intendment of Code § 18.2-31(c) and his ruling granting the Commonwealth's instruction to the contrary (see footnote 7 *supra*). For the reason just stated, we need not address these assignments of error.

Mu'Min also questions another ruling on another instruction granted by the trial court. Instruction number 1 defined capital murder in terms of the three statutory definitions charged in the indictment and the elements of the lesser-included offenses of first and second degree murder and voluntary manslaughter. The defendant believes that the instruction defined first degree murder and the standard of proof incorrectly and that the trial court erred in refusing his substitute draft.

In pertinent part, instruction number 1 told the jury that if they failed to find any of the three predicates for capital murder,

but find that the Commonwealth has proved beyond a reasonable doubt:

(1) That the defendant killed Gladys Napwasky; and

(2) That the killing was malicious; and

(3) That the killing was willful, deliberate and premeditated,

then you shall find him guilty of first degree murder. . . .

We find no error in this instruction. Indeed, we see no material difference between this definition and that of the substitute draft, and we reject the defendant's complaint.

IV. PENALTY TRIAL ISSUES

A. *Passion or Prejudice*

Whenever the death penalty is imposed, this Court is required to review the record to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor". Code § 17-110.1(C)(1). The defendant claims that the trial court committed error by refusing the jury's request for a definition of the particulars of a life sentence. We disagree. Rejecting a similar claim in an earlier capital case, we said that the jury's question actually "tends to show that the jury's deliberations were dispassionate, unprejudiced, and guided by earnest consideration of every factor relevant to the portentous decision they were required to make." *Delong v. Commonwealth*, 234 Va. 357, 370, 362 S.E.2d 669, 676 (1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 263 (1988).

The defendant also suggests that the jury's penalty decision was the result of some "other arbitrary factor". The defendant offered in evidence at the penalty trial a copy of a departmental regulation providing that "[a]

prisoner . . . shall not be left without supervision at any time." In response to the Commonwealth's objection, the trial judge said, "I question the relevancy. . . ." The defendant urges us to commute the sentence of death on the ground that the judge's comment influenced the jury "to disregard a major component of the defendant's evidence in mitigation."

For two reasons, we decline to do so. First, the transcript shows that the judge's comment was made to the attorneys in a side-bar conference. Having in mind the purpose of such a conference, we think it is unlikely that the comment was heard by the jury. Second, even if the comment was overheard, the trial court's decision to overrule the Commonwealth's objection and admit the document for the jury's consideration cured any prejudice the comment may have caused.

Having conducted a thorough review of the voluminous record of both phases of the trial, we find nothing to show that the penalty imposed by the jury and confirmed by the trial court was the product of passion, prejudice, or other arbitrary factor.

B. *Propriety of the Sentence*

As required by Code § 17-110.1(C)(2), we must now determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

1. Excessiveness

A death penalty is inherently excessive unless it is based upon what has come to be known as the "dangerousness predicate" or the "vileness predicate". Code § 19.2-264.4(C) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence

> of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Tracking the language of the statute as incorporated in the court's instruction number 1, the jury's verdict based the death penalty upon both predicates.

The defendant challenges the jury's finding of the vileness predicate because, he says, the Commonwealth's Attorney failed "to include torture in his bill of particulars" and "the evidence . . . did not establish torture."[8] We think the evidence of the multiple, grievous wounds inflicted upon Mrs. Napwasky was sufficient to prove torture, *see Tuggle v. Commonwealth*, 228 Va. 493, 516, 323 S.E.2d 539, 553 (1984), *vacted and remanded on other grounds*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985) ("torture" correctly included in vileness instruction where evidence was sufficient to show victim, "[w]hile still alive, . . . was severely bruised and bitten on her breast"). However, it is immaterial that the jury instruction and the jury's verdict contained the word "torture" when the bill of particulars did not. It is immaterial because, as defined in Code §§ 19.2-264.2 and -264.4(C), "the term 'vileness' includes three separate

---

[8] In another argument advanced on brief, Mu'Min says that "the sentence of death is excessive" because, had the government "exercised rudimentary care in supervision of the defendant, this crime would not have been committed." In effect, the defendant argues that an escapee who commits murder is entitled to immunity from the death penalty for his intrepidity in escaping supervision. We are unpersuaded.

and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death." *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282, *cert. denied*, 464 U.S. 977, 104 S.Ct. 414, 78 L.Ed.2d 352 (1983).

The autopsy report identified 16 cuts and puncture wounds on the victim's face, neck, chest, and left arm and numerous blunt-force injuries to the face and forehead. Clearly, the evidence was sufficient to prove an "aggravated battery", *i.e.*, "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *M. Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979). Indeed, a single stab wound may, under certain circumstances, be sufficient to satisfy this definition. *See, e.g., Stout v. Commonwealth*, 237 Va. at 132-33, 376 S.E.2d at 291-92; *Edmonds v. Commonwealth*, 229 Va. 303, 313, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985).

In light of the "evidence of the prior history of the defendant [and] of the circumstances surrounding the commission of the offense", Code § 19.2-264.4(C), we think the jury was entirely justified in finding that the defendant "would constitute a continuing serious threat to society", *id.* We need not recite the details of that evidence. It is enough that we have found proof of the vileness predicate sufficient to support the imposition of the death penalty. "When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence." *Tuggle v. Commonwealth*, 230 Va. at 110, 334 S.E.2d at 845, quoted with approval in, *Stout v. Commonwealth*, 237 Va. at 134, 376 S.E.2d at 292.

2. Disproportionality

Code § 17-110.1(C)(2) requires us to compare the case under review with "similar cases" in making our determination whether "the sentence of death is excessive or disproportionate". To facilitate that comparison as directed in § 17-110.1(E), we have accumulated the records in all capital murder cases to come before this Court (including those in which the penalty imposed was a life sentence) and stored and indexed those records apart from those in all other criminal cases. In selecting cases from that inventory for purposes of our comparison, we give special attention to those in which the death penalty was based upon the same statutory predicate (or predicates) as that underlying the penalty under review.

The cases in which the death penalty was based, as it was here, upon both the "future dangerousness" predicate and the "vileness" predicate are collected and annotated in our recent opinion in *Spencer v. Commonwealth*, 238 Va. 295, 319-20, 384 S.E.2d 785, 799-800 (1989). *See also R. Smith v. Commonwealth*, 239 Va. ——, 389 S.E.2d 871 (1990). We have compared the records in those cases with that in the case at bar, and we are satisfied that "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." *Stamper v. Commonwealth*, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

By counsel appointed specially, Mu'Min charges that his trial lawyer was ineffective because he failed at the penalty trial to submit certain instructions and to object to several instructions as well as to the verdict form approved by the trial court. These failures, he says, are patently prejudicial and unjustifiable by any acceptable explanation. In *Beaver v. Commonwealth*, 232 Va. 521,

352 S.E.2d 342, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987), we rejected just such a claim.

> Defendant complains of errors of omission committed by his trial counsel. Yet the record contains no testimony from trial counsel concerning his alleged acts of omission. Were we to attempt to dispose of defendant's contentions on this record, we would be called upon to declare the work of an attorney to be ineffective without that attorney having an opportunity to explain his conduct. [citation omitted.]
>
> The defendant argues, however, that though the record does not contain everything that relates to the question of ineffective assistance of counsel, it contains enough to establish that trial counsel failed to do things that obviously should have been done and for which there can be no acceptable explanation. However, [Code § 19.2-317.1] does not say that we can proceed where there is partial evidence of ineffectiveness. The statute presupposes a full record on the very issue that is the basis for the claim of effective assistance of counsel. We conclude, therefore, that defendant's claim of ineffective assistance of trial counsel cannot be raised in this appeal.

Id. at 537-38, 352 S.E.2d at 351-52.

Applying the qualifying language of Code § 19.2-317.1,[9] we remain committed to our previous rulings. Trial counsel will not be exposed to the possibility of professional disgrace with "an opportunity to defend himself on the record by giving the rationale for his challenged acts of omission or commission". *Correll v. Commonwealth*, 232 Va. 454, 470, 352 S.E.2d 352, 362, *cert. de-*

[9] Code § 19.2-317.1 provides:

> A claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial.

nied, 482 U.S. 931, 107 S.Ct. 3219, 96 L.Ed.2d 705 (1987); *accord Frye v. Commonwealth*, 231 Va. 370, 400, 345 S.E.2d 267, 287-88 (1986). *See R. Smith*, 239 Va. at —— n. 5, 389 S.E.2d at 886 n. 5. Mu'Min's claim of ineffective assistance of counsel cannot be considered in this appeal.

VI. CONCLUSION

Finding no reversible error in the conduct of either phase of the bifurcated trial and no cause to commute the death sentence, we will affirm the judgment confirming the jury's two verdicts.

Affirmed.

WHITING, J., with whom STEPHENSON and HASSELL, JJ., join, dissenting.

I cannot agree that the trial court correctly excluded all of the questions intended for the 16 prospective jurors who said they had acquired pretrial information about the offense. A trial court's assessment of prospective jurors' potential for bias is presumptively correct, *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 2891, 81 L.Ed.2d 847 (1984); *Pope v. Commonwealth*, 234 Va. 114, 124, 360 S.E.2d 352, 358 (1987), absent manifest error, *Patton*, 467 U.S. at 1031-32 n. 7, 104 S.Ct. at 2889 n. 7; *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961); *Pope*, 234 Va. at 124, 360 S.E.2d at 358. In this case, however, I believe there was "manifest error" in refusing to permit *any* of the questions necessary to establish a factual and objective basis for assessing juror impartiality.

The record discloses an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local

citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

When the prospective jurors were assembled, 16 of them responded affirmatively to the question of whether they had "acquired any information from the news media or from any other source" regarding the offense. The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> . . . .
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired in this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

Only one prospective juror responded to these inquiries; the balance remained silent. That prospective juror was excused for cause when he said he could not be impartial.

Because of the trial court's ruling, we do not know what the prospective jurors had read or heard about the case before trial. We do know, however, that the following information regarding the accused, not a part of the evidence at the guilt phase of trial, was published in the local papers:

1. His suspected assault upon a fellow prisoner, resulting in a broken nose.

2. His citation for 23 prison violations and his rejection for parole on six previous applications.

3. His 1973 conviction for the murder and robbery of a Grayson County cab driver, with some details of the crime and a statement from the Grayson County prosecutor that the death penalty was not available when the accused was convicted.

4. His juvenile record in New York and Virginia.

5. His alleged commission of a burglary and engagement in "Peeping Tom" activities while a prisoner. Also, there were indications that a rape may also have been involved in the commission of this murder.

An accused has statutory and constitutional rights to trial by an impartial jury. I do not believe that defense counsel was afforded a meaningful voir dire examination of prospective jurors, as mandated by Code § 8.01-358. The majority disposes of this contention in a footnote (n. 3) by relying upon *LeVasseur v. Commonwealth*, where we said that "[a] party has no right, statutory or otherwise, to propound any question he wishes, or to extend *voir dire* questioning *ad infinitum*." 225 Va. at 581, 304 S.E.2d at 653. Nothing in the record in the present case, however, suggests that defense counsel sought to "propound any question he wishe[d], or to extend *voir dire* questioning *ad infinitum*."

Code § 8.01-358 mandates that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . and shall have the right to ask such person . . . directly any relevant question to ascertain whether he . . . is sensible of any bias or prejudice." The section further provides that "[a] juror, knowing anything relative to a fact in issue, shall disclose the same in open court." Code § 8.01-358. More-

over, as we said in *LeVasseur*, "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause.'" 225 Va. at 581, 304 S.E.2d at 653.

In enacting Code § 8.01-358, the General Assembly intended to provide counsel a meaningful voir dire examination. Clearly, questions pertaining to what a prospective juror had seen, read, or heard about the case are "relevant . . . to ascertain whether he . . . is sensible of any bias or prejudice." Therefore, the court violated Mu'Min's statutory right to trial by an impartial jury.

Additionally, "[u]nder the Federal and State Constitutions, U.S. Const. amends. VI and XIV; Va. Const. art. 1, § 8, an accused has a right to trial by an 'impartial jury.'" *Wm. Patterson v. Commonwealth*, 222 Va. 653, 658, 283 S.E.2d 212, 215 (1981). As illustrated by the majority opinion, —— Va. at ——, 389 S.E.2d 892, we frequently apply federal decisions construing the Sixth Amendment right to an impartial jury in construing this same right under art. 1, § 8 of the Virginia Constitution. *See also, Mackall v. Commonwealth*, 236 Va. 240, 251, 372 S.E.2d 759, 766 (1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

An accused's right to trial by an impartial jury is violated if jurors are impanelled after an inadequate voir dire examination. *See, e.g., Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). If the examination is inadequate, the accused's right is prejudiced in two respects; he is unable to exercise effectively his right of challenge, *United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973), and the trial court is unable to assess fairly the prospective jurors' impartiality. *United States v. Davis*, 583 F.2d 190, 197-98 (5th Cir. 1978).

Thus, when there has been unusual pre-trial publicity in a criminal case, the Supreme Court has said that there

must be "fair support in the record for the state courts' conclusion that the jurors . . . would be impartial." *Patton*, 467 U.S. at 1038, 104 S.Ct. at 2892. Moreover, where prospective jurors have indicated that they were exposed to pretrial publicity in response to questions similarly to those posed in this case, we have warned: "[T]he *proof* that [a prospective juror] is impartial and fair, should *come from him* and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (emphasis added) (citations omitted).

In other words, "in the absence of an examination designed to elicit answers which provide an *objective basis* for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient. . . .'" *Silverthorne v. United States*, 400 F.2d 627, 638 (9th Cir. 1968) (emphasis added) (citations omitted). In at least two of our cases involving pretrial publicity, we have said that a trial court should have rejected such subjective assurances. *Justus v. Commonwealth*, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980); *Breeden*, 217 Va. at 298-300, 227 S.E.2d at 736-37. "[H]owever willing the juror might be to trust himself, the law will not trust him." *Breeden*, 217 Va. at 298, 227 S.E.2d at 735 (citations omitted).

Accordingly, whether a juror can impartially render a verdict "should not be [based] on that juror's [subjective] assessment of self-righteousness without something more." *Silverthorne*, 400 F.2d at 639. Instead, a trial court must objectively and independently assess each prospective juror's state of mind.

> When a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality. Instead, the *trial covrt* should make this determination.

Jordan v. Lippman, 763 F.2d 1265, 1274 (11th Cir. 1985) (emphasis added) (citation omitted). "The issue of who is, or is not, a competent juror is one for the trial court to decide," *Justus*, 220 Va. at 976, 266 S.E.2d at 91, not the juror himself.

Furthermore, I believe the questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias. Moreover, even if the court had required an express affirmation of each prospective juror, such an affirmation would have required an admission of bias or prejudice before the assembled panel. "No doubt each juror was sincere when he said that he would be fair and impartial to the [accused], but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin*, 366 U.S. at 728, 81 S.Ct. at 1645.

Apparently, we have never addressed the *necessity* of such questions at voir dire, where panel members have been exposed to unusual pretrial publicity. However, we have ample precedent for such questions. In *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974), the trial court sought a description of what was actually remembered by those prospective jurors who had been subjected to pretrial publicity. There, we sustained the trial court's objective findings regarding the impartiality of those prospective jurors, who we noted had remembered few of the details of such publicity. *Id.* at 717, 204 S.E.2d at 420. Although not the subject of our discussion, an inspection of the appendices in the following cases indicates that "content" questions were likewise asked of prospective jurors exposed to pretrial publicity. *Mackall*, 236 Va. 240, 372 S.E.2d 759 (1988); *LeVasseur*, 225 Va. 564, 304 S.E.2d 644 (1983), *cert. denied*, 464 U.S. 1063,

104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Justus*, 220 Va. 971, 266 S.E.2d 87; *Breeden*, 217 Va. 297, 227 S.E.2d 734; *Greenfield*, 214 Va. 710, 204 S.E.2d 414.

The questions proffered by the accused,[1] and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias.[2] Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware, as in *Justus* and *Breeden*. "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).

I believe that the majority's citation of *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), for the proposition that the opportunity to ask "content questions" is "not a matter of right," misconstrues the essence of that holding. The *Haldeman* Court explicitly agreed that a certain ABA Standard "mandate[d] an inquiry into the *sources and intensity* of a venireman's exposure to pretrial publicity, not an inquiry into his recollection of the content of that publicity." *Id.* at 69 (emphasis added). Moreover, emphasizing that the voir dire in *that* defendant's case permitted counsel to determine the *nature and intensity of the exposure* to pretrial publicity, the Court stated:

> We agree that it would have been reversible error for the Court to accept jurors simply because they said they would be fair. . . . In this case, however, the Court had before it and acted on not only the jurors' subjective assurances but also *objective information* relating how closely they had followed Watergate and their *sources* of information.

Id. at 67 n. 51 (citations omitted) (emphasis added). In addition, *Haldeman* distinguished *Dellinger* and *Silverthorne*, two cases involving constitutionally inadequate voir dire, on the ground that the trial courts in those cases failed to permit *any* questions concerning the source and intensity of exposure to pretrial publicity. *See id.* at 69.

As in *Dellinger* and *Silverthorne*, the trial court in this case rejected *all* voir dire questions aimed at determining the source and intensity of exposure to pretrial publicity, as well as "content" questions. In my view, it was not necessarily error to preclude some or even all of the "content" questions; however, the trial court's conduct of voir dire was constitutionally inadequate, even under *Haldeman*, in its blanket refusal to permit *any* questions aimed at determining the *sources and intensity* of exposure to pretrial publicity (e.g., where did you hear about this case; how many times did you hear about it; and when did you hear about it).

---

[1] The tenor of the proffered questions was: What have you seen, read or heard about this case; from whom did you get this information; when and where did you get this information; have you discussed this case with anyone; with whom; when and where; what did you discuss; if an opinion had been informed, what is it; has anyone expressed an opinion about this case to you; who; what; when; and where?

[2] Without necessarily approving each of the proffered questions, if the trial court permits no questions regarding the source and extent of exposure of pretrial publicity, and, therefore, content questions are necessary, at a minimum, I believe each prospective juror subjected to pretrial publicity should have been asked what information he recalled and when it was received. Moreover, the risk of "tainting" the other prospective jurors could have been minimized by excluding the others from the courtroom during each examination, or by examining them in smaller groups, as the court did.

In my opinion, under the circumstances of this case, the refusal to permit any questions regarding the source and intensity of knowledge regarding pretrial publicity violated the accused's statutory and constitutional right to trial by an impartial jury. Although I agree with the majority opinion in all other respects, I would reverse the judgment of the trial court and remand the case for a new trial at which appropriate voir dire questions should be asked.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of March, 1990.

Record No. 890899

Circuit Court No. 23103

DAWUD MAJID MU'MIN, a/k/a DAVID MICHAEL ALLEN,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 12th day of June 1989.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant on the merits and on the issue of ineffective assistance of counsel, each a fee of $1,550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ [Illegible]
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 20th day of April, 1990.

Record No. 890899

Circuit Court No. 23103

DAWUD MAJID MU'MIN, a/k/a, ETC.,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1990 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ [Illegible]
Clerk

SUPREME COURT OF THE UNITED STATES

No. 90-5193

DAWUD MAJID MU'MIN,
Petitioner

v.

VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

October 9, 1990

Justice Souter took no part in the consideration or decision of this petition.

Supreme Court, U.S.
FILED
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5193

In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

VIRGINIA

On Writ Of Certiorari To The
Supreme Court Of Virginia

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QUESTION PRESENTED

Whether in this capital case involving an extraordinary amount of potentially prejudicial pretrial publicity which the majority of the venire admitted having been exposed to, the Sixth, Eighth and Fourteenth Amendments permitted the trial court to refuse to conduct or permit any *voir dire* whatsoever regarding what the prospective jurors had read, heard, or seen about the case?

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BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Virginia affirming petitioner's conviction and sentence of death is reported as *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990), and is reproduced in the Joint Appendix (J.A.) at 95-124. The decision of the Virginia Supreme Court denying rehearing on April 20, 1990 is unreported, and is reproduced in the Joint Appendix at 126.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

Petitioner's conviction and sentence of death were affirmed by the Virginia Supreme Court on March 2, 1990. Rehearing was denied by the state court on April 20, 1990. The petition for writ of certiorari was filed in this Court on July 18, 1990. Certiorari was granted on October 9, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

This case also involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case involves the Due Process Clause of Section One of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Finally, this case involves Rule 3:14A(a) of the Rules of the Virginia Supreme Court, which states in relevant part:

> (a) Examination. – After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:
>
> (1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;
>
> (2) Is an officer, director, agent or employee of the accused;
>
> (3) Has any interest in the trial or the outcome of the case;
>
> (4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;
>
> (5) Has expressed or formed any opinion as to the guilt or innocence of the accused;
>
> (6) Has a bias or prejudice against the Commonwealth or the accused; or
>
> (7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Thereafter, the court, and counsel as of right, may examine on oath any prospective juror and ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

STATEMENT OF THE CASE

In 1973, when he was nineteen years old, petitioner was convicted of first degree murder in Grayson County, Virginia. He was sentenced to a term of imprisonment for 48 years for that offense. He has been incarcerated in the Virginia Department of Correction ever since. In the spring of 1988, he was assigned to Haymarket Unit 26, a minimum security institution in Prince William County, Virginia, and was working outside of the institution on a Department of Transportation work crew on September 22, 1988. The evidence at trial, as summarized by the Virginia Supreme Court, tended to show the following,

> When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale

Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Nopowsky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued. According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top part of her pants" and pulled them "down right . . . by the thighs." Mrs. Nopowsky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the nose and mouth and . . . a trickle of blood . . . from the neck." The defendant "checked her pulse to make sure she was okay," placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack on the highway. The defendant testified that he had not raped his victim.

Mu'Min v. Commonwealth, 239 Va. at 437-39, 389 S.E.2d at 889-90; J.A. 96-98. The autopsy revealed that the victim

died from stab wounds. Petitioner was subsequently charged with this offense following an anonymous letter sent to the authorities by another inmate.

As the three dissenting justices of the Virginia Supreme Court noted, the case generated

> an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

Mu'min v. Commonwealth, 239 Va. at 453, 389 S.E.2d at 899; J.A. 116-17. The press reports contained substantial prejudicial information which was not introduced into evidence at the guilt phase of petitioner's trial. *Id.*[1] Other information included in the stories was not admitted at either phase of the proceedings. For example, the media accounts included reports that:

- Petitioner was suspected of beating another inmate while awaiting trial for this offense;[2]

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[1] The case was covered not only by the local papers (*the Potomac News, the Weekly Messenger*, and *The Prince William Journal*) but also by *The Richmond Times* and *The Washington Post*.

[2] *See, e.g.*, App. 921; 942. One headline read: "Accused killer is suspect in beating." App. 921. This information was

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- Petitioner had 23 prison rule violation citations;[3]

- Petitioner had been rejected for parole six times;[4]

- Petitioner was convicted of the 1973 murder and robbery of a Grayson County cab driver. Details of the 1973 crime were included in the stories as was a statement from the Grayson County prosecutor to the effect that the death penalty was unavailable at the time of petitioner's earlier conviction as a result of this

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apparently released to the press on the command of the District Attorney. January 30 tr. 105.

The complete transcript of record was transcribed by court days and the pages are numbered accordingly. These transcripts are referred to in this brief by the date followed by "tr." and the page number. The appendix filed in the Supreme Court of Virginia in connection with petitioner's direct appeal to that court is referenced in this brief as "app."

[3] *See, e.g.*, App. 931; 942. One of the stories was headlined "Accused killer had history of prison trouble." App. 942. Furthermore, a Virginia Department of Corrections internal report, prepared in connection with this offense, was printed in its entirety in the local papers. This report contained a detailed account of petitioner's correctional record. App. 963-69. The reports did not indicate, however, that many of these violations were for minor transgressions of prison regulations such as refusing to serve pork to other inmates as a result of his religious beliefs, and standing improperly.

[4] *See, e.g.*, App. 923; 942. Petitioner was also described on numerous occasions as not being a "model prisoner." App. 923; 931.

Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972);[5]

- Petitioner's juvenile record in New York and Virginia.[6]

- Petitioner's had previously broken into a house and a car, and engaged in "Peeping Tom" activities while a prisoner. There were also reports that petitioner routinely left the work site and stole clothes, beer, and wine when he did so.[7]

- A rape may have been involved in the commission of this murder.[8]

- Petitioner was described as being "lustful" and as "doing strange things." Other accounts indicated petitioner had access to a VCR and watched pornographic movies in his bunk.[9]

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[5] *See, e.g.*, App. 948; 951. One headline in this connection stated: "Mu'Min avoided death for 1973 murder in Va." Petitioner was also repeatedly referred to in the press accounts as a "convicted murderer." *See, e.g.*, App. 925; 927; 929; 932; 949; 973.

[6] *See, e.g.*, App. 965-69.

[7] *See, e.g.*, App. 922; 930; 932; 963. These accounts also discussed allegations that inmates had access to weapons, liquor and drugs, that they intimidated guards, that inmates dressed in civilian clothes to "blend in," and that they routinely left the work site to go on "shoplifting sprees." The reports frequently referred to "lax supervision." One article discussing the incident was headlined: "Laxity was factor in sex killing." App. 922. The story went on to report that the husband of the victim intended to sue the state after petitioner's trial to make sure "it never happens again." *Id.*

[8] *See, e.g.*, App. 934; 951. Several headlines referred to the crime as a "Sex Killing." *See. e.g.*, App. 922.

[9] *See, e.g.*, App. 930; 961.

- Headlines and various accounts indicated that petitioner had confessed to the crime.[10]

There were also numerous citizen's editorials and letters to the editor about this case. These stories not only lauded the good character of the victim and her contributions to the community, but also expressed outrage that a violent offender could be allowed at large in the community. *See. e.g.*, App. 926; 930; 940-41.[11] For example, the writer of one article demanded protection from the "criminal element" which was "allowed to enter into our communities without regard to the public safety." App. 974. There were demands that all officials in any way associated with this debacle be immediately fired. *See, e.g.*, App. 930; 931; 937.

The barrage of publicity and public outrage occurred at a moment when incidents such as the one alleged here were the focus of especially intense national interest. The offense occurred in the fall of 1988, during the midst of the Bush/Dukakis presidential campaign. A crime committed in Maryland by another convicted murderer and inmate, Willie Horton, was a major theme in the campaign. Several of the stories regarding petitioner's offense discussed the Willie Horton case and the presidential election. See App. 970. One article stated that the Virginia prison furlough program was being suspended not only as a result of petitioner's offense but also because of "the climate created by the national presidential campaign."

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[10] *See, e.g.*, App. 975.

[11] One story contained the comments that: "she [the victim] was a sister to us," that talking about the crime "is too difficult for us," and that the "community will remember Gladys for what she was." App. 926.

Id. Other articles discussed petitioner's case in the context of other murders committed by inmates in the Virginia Department of Corrections. App. 974.

The press accounts following petitioner's case also depict a pointed response by high officials in the Virginia state government. The Secretary of the Virginia Department of Transportation, Vivian Watts, made a widely-reported public apology (on behalf of herself and the Governor) for the crime in which she stated: "I know this will not bring [Gladys] Nopowsky back to her family but we are deeply sorry." App. 927. Shortly after this, then Virginia Governor Balilles, suspended the Virginia work-release and trusty programs, to the accompaniment of great media fanfare. App. 923; 932; 934; 938; 970. Lieutenant Governor Wilder expressed his "revulsion" that such a thing could happen. App. 947. Local politicians referred to the case as "shocking" in their campaigns, with several using it as a paradigmatic example of allegedly pervasive shortcomings in the criminal justice system. App. 936; 980. Several pieces of legislation were introduced to bar inmates from being able to work in urban areas. App. 933; 958. The District attorney who ultimately prosecuted petitioner used the case as a rallying call for "swifter capital punishment," and further stated that "the penal system [was] . . . the weak link in the criminal justice system." App. 980.

As a result of this pervasive and extremely prejudicial publicity, trial counsel requested a change of venue. The trial judge conducted a hearing on January 30, 1989. Counsel pointed out the unprecedented volume of publicity, noting that petitioner's case had averaged one story a day and drew the judge's attention to the substantial

prejudicial information contained in the news accounts. A number of articles regarding the case were introduced into evidence at the hearing. Counsel noted that the articles gave the details of petitioner's 1973 offense. He also referred to the political nature of many of the stories including Governor Balilles' action in suspending the state's furlough program, statements by various candidates for office and various bills introduced in the Virginia legislature. The trial judge denied the motion, stating that it was his "considered opinion that we can get a fair and impartial jury." App. 108.[12] Another pretrial hearing was conducted on April 14, 1989. Petitioner's counsel submitted a list of proposed *voir dire* questions to determine whether the prospective jurors had read or heard anything about the case, and if so what. The relevant questions requested by trial counsel are set out in full below.

31. Have you acquired any information about this case, from the newspapers, television, conversations or any other source?
32. What have you seen, read or heard about this case?
33. From whom or what did you get this information?
34. When and where did you get this information?

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[12] The trial judge also remarked that, "I've heard it said that in this particular area in spite of the volume of papers that you can get a fair jury for anything that you want to." App. 107. He also remarked on one other occasion: "I think sometimes media people think that their stories get a whole lot more publicity than so." April 17 tr. 57; J.A. 71.

35. Have you discussed this case with anyone?
36. With whom?
37. When and where?
38. What did you discuss?
39. Have you formed an opinion or conclusion about this case?
40. What is it?
41. Has anyone expressed any opinion about this case to you?
42. Who? What? When? Where?

Letter to Trial Judge with proposed jury questions, App. 17-29; J.A. 2-7. Counsel also requested individual *voir dire* and additional peremptory challenges. April 14 tr. 15-16. The trial court ruled that counsel would be permitted to ask only whether they had heard, read, or seen anything about the case and whether that information would affect their prospective impartiality. Defense counsel were prohibited from inquiring about what information the juror had previously learned about the case, and about the content of their discussions with other individuals. App. 58; J.A. 15. In short, all of counsel's proposed content questions were refused. Tr. April 14 tr. 57-59; J.A. 31-32.[13]

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[13] Although the trial judge indicated that he was limiting the questions in accordance with Virginia Supreme Court Rule 14A, he permitted other questions which were not specifically set forth in the rule. For example, he permitted questions regarding whether any of the jurors lived within a mile of Ashland Plaza, the scene of the crime, and whether any of the

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The trial judge also denied petitioner's request for individual *voir dire*, expressing his view that individual questioning was akin to putting the jurors themselves on trial. App. 26; J.A. 17. He further denied counsel's motion for additional peremptory challenges, and to sequester the jury during the trial. J.A. 16-17.

Jury selection commenced on April 17, 1989. During jury selection, the trial judge asked the panel the following questions:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?
>
> Is there anyone who has acquired any information from the news media or from any other source?

April 17 tr. 16; J.A. 46. Sixteen of the original twenty panel members answered in the affirmative. April 17 tr. 16-18; J.A. 4647. The court then asked the following questions.

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you

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jurors had ever been a victim of a crime. App. 37; J.A. 20. The trial judge allowed some of these questions, despite his feeling that they were irrelevant, because "[i]ts not worth arguing over." April 14 tr. 37, 46; J.A. 19, 27. However, the record reflects that he strictly adhered to his prohibition of any questioning concerning pretrial publicity other than conclusory questions expressly authorized by Virginia Supreme Court Rule 3:14A.

> may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

April 17 tr. 18-19; J.A. 47-49. One of the 16 panel members who admitted to having prior knowledge of the case responded affirmatively to these questions and was dismissed for cause. April 17 tr. 21; J.A. at 48-49.[14] Petitioner's counsel requested that all jurors who indicated that they had been exposed to pretrial publicity be excused for cause. The basis of this motion was that as a result of the trial judge's denial of all content oriented *voir dire*, a fair and impartial jury could not be selected unless the jurors who indicated they had read about or

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[14] This juror responded to attempted rehabilitative questions as follows: "it would take an awful lot to change my mind." April 17 tr. 19; J.A. 48.

discussed the case with others were dismissed. April 17 tr. 51-52. This motion was denied, as was petitioner's renewed motion for a change of venue based on the pretrial publicity. April 17 tr. 54; J.A. 69-71.

Seven of the original panel of prospective jurors who indicated that they had heard, read, or seen something about the case were eventually seated on the jury that convicted Dawud Mu'min and recommended that he be sentenced to death. April 17 tr. 16-18, 197.[15] One other juror, Paul Tsou, who was placed on the panel after the above-mentioned strike for cause and who was eventually chosen as a juror, indicated during questioning that he had previously heard about the case and that he had discussed it with another individual. April 17 tr. 25, 197. As additional jurors were called to replace panel members who were excused for cause, most of these individuals also indicated they had read media accounts of the case. *See. e.g.*, April 17 tr. 104, 111, 130. Several of these individuals also ultimately served on petitioner's jury.

Petitioner's trial commenced later in the day on April 17, 1989. Based on the evidence presented, *see infra* at 3-5, the judge submitted to the jury several lesser included offenses of capital murder including first degree murder, second degree murder, and voluntary manslaughter. Petitioner was convicted of capital murder on April 20, 1989. Following a sentencing hearing, the jury recommended that he be sentenced to death. The jury deliberated for several hours on the issue of sentence and at one point

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[15] These jurors were: Carrington Boothe, Albert Runion, Sheila Waters, John Taylor, Rita Wolfe, Evelyn Thorpe, and Sandra Dame.

returned with a question regarding the meaning of a life sentence. The trial judge refused to answer the question. April 24 tr. 92. Shortly thereafter, the jury recommended that petitioner be sentenced to death. Before releasing the jury, the trial judge noted that there "are considerable media people in here," and "[t]his case has generated considerable media interest." April 24 tr. 98.[16] After taking the matter under advisement and reviewing a presentence report, the trial judge accepted the jury's recommendation and sentenced petitioner to death on June 12, 1989.

On appeal, petitioner contended that he was entitled to a new trial as a result of the judge's failure to permit the proposed *voir dire* questions. The Supreme Court of Virginia responded that while a criminal defendant may properly ask on *voir dire* whether a juror has previously acquired any information about the case, he does not have, under any circumstances, a constitutional right to explore the *content* of the acquired information. Rather, the majority concluded an accused is only entitled to know whether the juror can remain impartial in light of the previously obtained information. *Mu'Min v. Commonwealth*, 239 Va. 433, 443, 389 S.E.2d 886, 893 (1990); J.A. 103-04.

Justice Whiting wrote a dissenting opinion which was joined by two other justices. Justice Whiting concluded that under the unusual circumstances presented by petitioner's case, it was manifest error for the trial

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[16] He had made similar remarks through the trial. *See, e.g.*, April 17 tr. 194.

court to refuse to permit *voir dire* regarding what the prospective jurors had previously read or heard.[17] After noting the unusual amount of prejudicial pretrial publicity, the dissent concluded:

> The questions proffered by the accused, and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias. Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware. . . . "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 849, 78 L.Ed.2d 663 (1984).

Mu'Min v. Commonwealth, 239 Va. at 457-58, 389 S.E.2d at 901; J.A. 121.

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[17] The dissent pointed to a number of matters contained in the publicity which were not introduced into evidence at the guilt-or-innocence phase of petitioner's trial. 239 Va. at 454, 389 S.E.2d at 899, J.A. 117-118. Furthermore, as is set out in detail *supra* at 33-34, many "facts" set forth in the press accounts were not introduced at the sentencing phase of petitioner's trial either.

SUMMARY OF ARGUMENT

The Sixth and Fourteenth Amendments guarantee every defendant the right to a fair and impartial jury. A jury's verdict, especially in a capital case, must be based solely upon the evidence admitted in open court, and cannot be shaped by outside influences. Adverse and excessive pretrial publicity can jeopardize this right. Thus, in a case attended by extraordinary publicity, a trial judge has an affirmative constitutional duty to take whatever steps are necessary to eliminate the adverse effects of that publicity. Adequate *voir dire* is one of the most basic steps. *Voir dire*, as this Court has recognized, aids in discerning bias and enables counsel to use challenges intelligently to obtain an impartial body of jurors.

Petitioner's case involved an exceptional amount of prejudicial pretrial publicity, which the majority of the panel and ultimately the majority of the petit jury that convicted petitioner and sentenced him to death had been exposed to. The trial judge, however, refused to permit any *voir dire* whatsoever regarding the content of the information to which the jurors had been exposed. This action precluded petitioner from selecting a fair and impartial jury. Under all the circumstances of this case, the trial judge was obligated to permit some inquiry into what the prospective jurors had read and heard about the case out of court. He did not, and for this reason the judgment of the Supreme Court of Virginia should be reversed.

ARGUMENT

UNDER ALL THE CIRCUMSTANCES OF THIS CASE, THE TRIAL JUDGE WAS UNDER AN AFFIRMATIVE CONSTITUTIONAL DUTY TO VOIR DIRE THE PANEL REGARDING THE CONTENT OF THE INFORMATION THAT PROSPECTIVE JURORS HAD BEEN EXPOSED TO.

A The Sixth, Eighth and Fourteenth Amendments Mandate that the Jury in a Capital Case be Impartial as to Both a Defendant's Guilt-or-Innocence and the Appropriate Punishment.

The jury occupies "a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).[18] To serve this function, the jury, as guaranteed by the Sixth Amendment, must be fair and impartial. The Due Process Clause of the Fourteenth Amendment requires, at a bare minimum, a "fair trial in a fair tribunal." *In Re Murchison*, 349 U.S. 133, 136 (1955). These constitutional guarantees of a fair trial by a panel of impartial, indifferent jurors, *see Turner v. Louisiana*, 379 U.S. 466, 472 (1965), govern every criminal case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi v. Wisconsin*, 400 U.S. at 509.[19]

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[18] This is so because, as this Court has stated: "[i]n the ultimate analysis, only the jury can strip a man of his liberty or his life." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971).

[19] *See also Irvin v. Dowd*, 366 U.S. 717 (1961):

> More than one student of society has expressed the view that not the least significant test of the quality

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The theory underlying these protections afforded by our constitutional system is simple and straightforward: the jury's verdict in any case must be "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due Process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen"); *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) ("[o]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial"); *Ham v. South Carolina*, 409 U.S. 524, 531 (1973); *Groppi v. Wisconsin*, 400 U.S. at 509; *Sheppard v. Maxwell*, 384 U.S. 333, 351

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> of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him."

Id. at 729 (Frankfurter, J., concurring).

(1966); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Thus the quest for an impartial jury required by the Sixth and Fourteenth Amendments is for "jurors who will conscientiously apply the law and follow the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). In the words of Lord Coke, a juror must be "indifferent as he stands unsworne," Co. Litt. 155b, and the basic theory underlying our system of criminal justice is that a juror whose evaluation of the evidence is likely to be jaundiced by prejudgment cannot be impartial. *See Reynolds v. United States*, 98 U.S. 145, 146 (1878). As this Court has recognized, this requirement goes to "the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. at 472. Whenever circumstances surrounding a jury trial threaten to "undermine the fairness of the factfinding process" by allowing the influence of prejudgment to "dilut[e] . . . the principle that guilt is to be established by probative evidence and beyond a reasonable doubt[,] . . . the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-04 (1976).

This Court has recognized that adverse and excessive pretrial publicity can jeopardize a defendant's right to a fair and impartial jury. *See Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial"); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 378 (1979); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 552-54 (1976); *Sheppard v. Maxwell, supra; Irvin v. Dowd, supra;*

Estes v. Texas, 381 U.S. 532 (1965);[20] *Rideau v. Louisiana*, 373 U.S. 723 (1963). Thus, in cases surrounded by intensive publicity, this Court has placed an "affirmative constitutional duty" on trial judges to take whatever steps are necessary to eliminate the effects of the publicity on the defendant's right to a fair and impartial jury. *Gannett Co.*, 443 U.S. at 378; *see also Chandler v. Florida* 449 U.S. at 574 (when publicity is intense, "[t]rial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and relevant law"); *Nebraska Press Association v. Stuart*, 427 U.S. at 555 ("the trial judge has a major responsibility" to mitigate the effects of adverse pretrial publicity); *Sheppard v. Maxwell*, 384 U.S. at 363 ("[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, trial courts must take strong measures to ensure that the balance is never weighed against the accused"); *Frazier v. United States*, 335 U.S. 497, 511 (1948).[21]

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[20] In *Estes*, this Court noted:

> While maximum freedom must be allowed the press in carrying out this important function in a democratic society, its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.

381 U.S. at 539.

[21] *See also Frank v. Mangum*, 237 U.S. 309, 349 (1915) ("[a]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.") (Holmes, J. dissenting).

These principles apply with special force in capital cases. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983). And the Court has struck down capital sentences when it found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.' " *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring in part and concurring in judgment) (citation omitted). In sum, the state must assure reliability in the process by which a person's life is taken. *See Gregg v. Georgia*, 428 U.S. 153, 189, 196-206 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Beck v. Alabama*, 447 U.S. 625 (1980); *Turner v. Murray*, 476 U.S. 28 (1986); *Penry v. Lynaugh*, ___U.S.___, 109 S.Ct. 2934 (1989).

It is for this reason that for almost one hundred years, the Constitution has required that when the government seeks to exact upon a defendant the ultimate penalty, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892); *see also Irvin v. Dowd*, 366 U.S. at 728 ("with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . . . "); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) (risk in denying adequate *voir dire* is "most grave when the issue is of life or

death"). Compared to jurors in non-capital cases, who must weigh evidence against an exacting standard of proof, the juror in a capital sentencing proceeding faces a uniquely different task. A capital sentencing jury's task is inherently subjective as it essentially makes a moral judgment and acts as the conscience of the community. *See California v. Brown*, 479 U.S. 538, 542 (1987) (O'Connor, J. concurring); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986)[22]; *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

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[22] In *Turner*, this Court noted that capital sentencing proceedings are uniquely vulnerable to the infection of racial prejudice. The Court also noted that the Virginia capital sentencing scheme allows for substantially more discretion than other systems sanctioned by the Court. 476 U.S. at 34. Even if a Virginia jury finds an aggravating circumstance, it may still, in its discretion, recommend not to impose the death penalty. *Id.* Thus the Court concluded that the failure to conduct *voir dire* in Turner's case regarding potential juror's racial bias violated the Eighth Amendment, and vacated his sentence of death.

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether Petitioner's crime involved the aggravating factors specified under Virginia law. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of Petitioner's crime, might incline a juror to favor the death penalty. The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.

476 U.S. at 35-36

B. The constitutional right to a fair and impartial jury requires a trial judge to take appropriate steps to protect the right.

Of course, the impartiality of jurors is not a technical conception and can never be reduced to any particular formula; rather it is a state of mind, a "mental attitude of appropriate indifference." *United States v. Wood*, 299 U.S. 123 (1936). It is for this reason that any juror's competence "ultimately depends on an assessment of his [or her] qualifications and ability impartially to consider evidence presented at trial." *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (citation omitted). While the Constitution may not lay down any particular tests or procedures to determine this attitude of "appropriate indifference," *see Frazier v. United States*, 335 U.S. 497 (1948), one principle cannot be disputed: the right to an impartial jury necessarily carries with it the concomitant obligation on the trial judge's part to take reasonable steps to insure the jurors' ability to serve without bias in a given case. Thus "the preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950).

That opportunity must include "searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence." *Nebraska Press Association v. Stuart*, 427 U.S. at 564. For this Court has repeatedly held that the inquiry cannot stop with a prospective juror's own pronouncement that he or she is sensible of no prejudgment or bias. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) ("[n]o doubt each juror was sincere when he said that he wanted to be fair and impartial to [the defendant] . . . , but the psychological impact requiring

such a declaration before one's fellows is often its father"); *Murphy v. Florida*, 421 U.S. 794, 800 (1975) ("the juror's assurances that he is equal to [the] . . . task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality' "); *Patton v. Yount*, 467 U.S. 1025, 1031 (1984) ("adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed"). Thus, when a juror asserts on *voir dire* that he or she can be impartial, the question "should the juror's protestation of impartiality [be] . . . believed" must be resolved by a factual finding of the court. *Id.* at 1036. On this issue, as on any other factual question decisive of federal constitutional rights, the defendant has a federal constitutional right to make an adequate record. *See. e.g., Carter v. Texas*, 177 U.S. 442 (1900); *Coleman v. Alabama*, 377 U.S. 129 (1964); *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972) (per curiam).

Meaningful *voir dire* is the primary method which our system of criminal justice relies upon to identify juror bias. *Patton v. Yount*, 467 U.S. at 1030; *see generally* 5 Wigmore, *Evidence*, §1367 (3d ed. 1940); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975). *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury is not transgressed. *Voir dire* examination is frequently essential to enable the court and the parties to choose a jury "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. at 217. Furthermore, *voir dire* "serves to protect the right

[to a fair and impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 554.[23]

It is for these reasons that the Court has recognized that without an adequate *voir dire*, the trial judge cannot fulfill his responsibility to remove prospective jurors who are not able to impartially follow the court's instructions and evaluate the evidence presented at trial. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Connors v. United States*, 158 U.S. 408, 413 (1895). To shirk this constitutional responsibility destroys both the reality and the appearance of fairness. *See Aldridge v. United States*, 283 U.S. 308, 315 (1931) ("[w]e think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrespect."); *see also Rosales-Lopez v. United States*, 451 U.S. at

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[23] *See also* Suggs & Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. 245, 249 (1981).

> [Voir dire is critical because] the rules of evidence can only partly limit the extent to which a juror's bias affects his deliberation. The tests which the law furnishes to the jury for weighing evidence are crude and imperfect and provide few internal checks on jury prejudice. There is a critical area in every case, where a juror must rely on his own experience to reach a decision. If bias permeates a juror's thinking, it may distort the importance of evidence consistent with it. . . . Bias may, therefore, be a fact of singular importance in the case.

188; *Sheppard v. Maxwell*, 384 U.S. at 352 (" 'our system of law has always endeavored to prevent even the probability of unfairness' "); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").

While trial courts have considerable discretion to limit *voir dire*, in exercising that discretion the "trial judge must be zealous to protect the rights of an accused." *Dennis v. United States*, 339 U.S. 162, 168 (1950). The procedures required may vary from case to case, but the particular procedures employed must always be guided by "the essential demands of fairness." *Lisenba v. California*, 314 U.S. 219, 236 (1941); *see also Ristaino v. Ross*, 424 U.S. 589, 596 (1976); *Aldridge v. United States*, 283 U.S. at 473. In the words of the first Justice Harlan, "[a]ny system for the impaneling of a jury that prevents or embarrasses the full unrestricted exercise of the right to [select a fair and impartial jury] must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894).

In other words, there are limits on the trial court's discretion in this area. *Ristaino v. Ross*, 424 U.S. at 596. This is the essential teaching of the Court's decision in *Ham v. South Carolina*, 409 U.S. 524 (1973). *Ham* involved the state court-prosecution of a young, bearded, black civil rights worker for possession of marijuana. Ham maintained that he had been framed on the drug charge as a result of his civil rights work, and thus sought to inquire whether any member of the jury was prejudiced against black persons or persons with beards. In *Ham*, as in petitioner's case, while the trial judge asked several general questions regarding bias and prejudice, he declined to inquire into particular grounds of bias. This

Court held that, on the facts of that case, the general questions propounded by the trial court were constitutionally inadequate and that "the Fourteenth Amendment required the judge . . . to interrogate the jurors regarding racial prejudice." *Id.* at 527.[24]

Ham recognized that the right to challenge has little or no meaning if it is unaccompanied by the right to ask or ask for relevant questions on *voir dire*. *Ham* therefore held that the latter right arises whenever, under all the circumstances, there is a likelihood that, absent adequate questioning, the jurors will be partial. *Ham* established that the opportunity for questioning on *voir dire* must be sufficient to reasonably test potential jurors for bias or partiality. *Id.* at 527; *see also United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964). If the inquiry is so restricted by the trial judge that the defendant is denied a fair chance to demonstrate bias and partiality on the part of prospective

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[24] The Court held that it was not constitutional error to fail to *voir dire* the jury regarding bias against persons with beards. *Ham* also sought to raise the issue whether it was error for the trial court to refuse to inquire about allegedly prejudicial pretrial publicity. The Court concluded this was not a cognizable claim in Ham's case because:

> the record before us contains neither the newspaper articles nor any description of the television program in question. Because of this lack of material in the record substantiating any pretrial publicity prejudicial to this petitioner, we have no occasion to determine the merits of his request to have this question posed on *voir dire*.

Id. at 528 (footnote omitted).

jurors, the Sixth and Fourteenth Amendments are violated. *See also Dennis v. United States*, 339 U.S. at 171-72. While the constitutional requirement cannot be reduced to any particular formula, it is clear that if the circumstances of a particular case strongly suggest the need for specific questioning, a defendant's Sixth and Fourteenth Amendment right to impanel an impartial jury is abridged by a trial judge's refusal to allow such questioning. *Ristaino v. Ross*, 424 U.S. at 596-97.

Ham is not limited, as respondent may argue, to cases involving the possibility of racial bias. This was implicitly recognized in *Ristaino*, *Aldridge*, and *Dennis v. United States*. For example, in *Aldridge* the Court noted: "[T]he right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." 283 U.S. at 313. Similarly, in *Dennis v. United States*, the Court acknowledged that under the circumstances of that case, the defendant had the right to inquire into possible prejudices resulting from the defendant's ties to the Communist Party. 339 U.S. at 171-72. Finally, *Ristaino* indicates that the predominant concern in *Ham* was not racial bias for its own sake but the potential for racial bias to deny the defendant a trial by a fair and impartial jury in the particular circumstances of Ham's case.

This principle also emerges clearly and unmistakably from *Sheppard v. Maxwell*, *Irvin v. Dowd*, and their progeny, all of which deal with adverse pretrial publicity. In those cases, it was the tone, content and pervasiveness of the publicity that denied the defendants the right to a fair and impartial jury. *See Nebraska Press Association v. Stuart*,

427 U.S. at 554-55 ("jury's capacity to be impartial is shaped by the tone and extent of the publicity"). In *Gannett Co. v. DePasquale Nebraska Press* and *Sheppard*, the Court emphasized the trial judge's "affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity," *Gannett Co.*, 443 U.S. at 378; *Nebraska Press*, 427 U.S. at 555; *Sheppard*, 384 U.S. at 362-63. The Court specifically indicated that a "searching questioning of prospective jurors" was a critical tool to be used by trial judges in identifying juror bias. *Nebraska Press Association*, 427 U.S. at 564;[25] *Sheppard*, 384 U.S. at 367-362.[26]

No other procedure is suitable to the task. For to restrict the *voir dire* questioning of prospective jurors – as

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[25] *See also id.* at 602 ("Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.") (concurring opinion of Brennan, J., joined by Stewart & Marshall, JJ.); *see also United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972) (quoting *Silverthorne v. United States*, 400 F.2d 627, 637-38 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971) ("when pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the *voir dire* examination of the jurors affords a fair determination that no prejudice has been fostered.")).

[26] This, of course, is by no means a new conception. On numerous occasions, this Court has noted with approval the extensive *voir dire* utilized by Chief Justice Marshall to ferret out the impact of negative press accounts in order to secure a fair and impartial jury in Aaron Burr's 1807 treason trial. *See United States v. Burr*, 25 Fed. Case. No. 14,6925, p. 49.

was done in this case – to the inquiry whether *they* believe that whatever unspecific out-of-court information they have read and heard has indelibly prejudiced their thinking is to disable counsel from testing, and the judge from reviewing, the basis for the jurors' confidence in their own impartiality. This procedure, quite simply, removes the defendant's right to an impartial jury from the process through which all other constitutional rights are enforced: the basic process of adjudication by a judge, who determines the governing standard of constitutional law and applies it to facts openly spread on the record, subject to appropriate appellate review. It substitutes for this process one in which the enforcement of the right to an impartial jury is instead consigned to the subjective, unlearned, unexamined, and unreviewable judgments of the very prospective jurors whose partiality is in question. This is about as satisfactory as enforcing the defendant's right against coerced confessions, for example, by allowing nothing more than that defense counsel may inquire of the investigating officer, on cross-examination: "Was the confession that you took from the defendant voluntary, in your judgment?"

C. Under all the circumstances of petitioner's case, the trial judge was required to conduct an adequate *voir dire*.

The circumstances of this case reveal a constitutionally significant likelihood of bias and partiality, requiring appropriate judicial action. As the three dissenting justices of the Virginia Supreme Court noted, there was an unusual amount of pretrial publicity. The publicity not only highlighted a one-sided version of the

alleged circumstances of the crime, but contained detailed information regarding petitioner's criminal and institutional records. The stories reported statements by administrative and political officials deploring the offense, and discussed citizens' outrage that such a thing could happen in their community. The case was drawn into even more intense public scrutiny as a result of petitioner's status as an inmate and the national political climate of the moment. Office-holders and candidates used the case as a rallying call for reform. Petitioner's case came to symbolize in the press all that an already aroused public thought wrong with the penal system.

Despite the extraordinarily negative publicity and the fact that sixteen of the initial twenty prospective jurors responded affirmatively to the trial court's question whether they had "acquired any information from the news media or from any other source" regarding the offense, the trial judge refused to inquire into the nature of the information to which any of the jurors had been exposed. As his comments indicate, the trial judge apparently had convinced himself prior to trial that a fair and impartial jury could be obtained in Prince William County (and that jurors do not in any event pay much attention to press accounts regarding a case), and would not allow any questions designed to prove otherwise. He repeatedly denied defense counsel's requests for questioning regarding the content of that information. Over defense counsel's repeated and strenuous objections, he limited questioning to several general questions which asked the prospective jurors to say, whether, in spite of the unspecified information they had acquired, they could be impartial. Thus neither counsel nor the court

had any way of knowing what the jurors had read, heard, seen, or discussed.

This was especially significant in light of the fact that substantial information regarding petitioner, not introduced into evidence at the guilt phase of petitioner's trial, was published in the papers. As was noted previously, this information included, *inter alia*, his prison disciplinary record, acts of uncharged misconduct, his juvenile record and the details of his 1973 murder conviction. Furthermore, aside from the specific details included in the press accounts, the tone of the articles was relentlessly negative. Petitioner's offense was linked with crimes committed by other inmates including the then infamous Willie Horton.[27]

Some, but certainly not all, of this information was introduced at the sentencing phase of petitioner's trial. However, press coverage remained the sole source of such prejudicial allegations as the prosecution had been unable to seek the death penalty against petitioner in 1973 as a result of this Court's decision in *Furman v. Georgia*. A number of acts of uncharged misconduct

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[27] Under these circumstances, respondent cannot seriously contend that any error at the guilt-or-innocence phase of petitioner's trial was harmless. First, the trial judge charged the jury regarding a number of lesser included offenses, i.e., first degree murder, second degree murder, and involuntary manslaughter. A reasonable impartial jury could, on the basis of the evidence presented at trial, have found him guilty of one of these lesser offenses. Furthermore, it is a basic principle of due process that every defendant, no matter what the evidence against him is entitled to an impartial factfinder. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

which were not introduced at either phase of petitioner's trial were also included in various newspaper stories. The accounts also included articles and editorials regarding the victim's good character, and the fact that her death was a significant loss to the community.

Furthermore, the thrust of many of the articles was to hold out petitioner's case as a crying example of a number of broader evils. As has been referred to throughout this brief, there were numerous accounts regarding legislative and executive efforts to prevent prisoners from being permitted to work in urban areas, and citizen demands that officials involved in allowing petitioner to participate in the work release program be fired. These accounts at times intertwined petitioner's offense and the themes of the 1988 presidential and local political campaigns. Petitioner's case, in short, became part of a referendum on crime and the criminal justice system.

Certainly, under these circumstances, the essential demands of fairness embodied in the Sixth and Fourteenth Amendments required that petitioner's proposed questions, or reasonable substitutes, be asked. While it is true that jurors do not have to be totally ignorant about the facts of a case in order to be fair and impartial, *see Irvin v. Dowd*, 366 U.S. 717, 720 (1961); *Murphy v. Florida*, 421 U.S. 794 (1975), due process demands that a defendant be given an adequate opportunity to show bias. *Id.* at 800; *Irvin*, 366 U.S. at 723. Thus if the publicity taken as a whole poses a significant danger that jurors may have been influenced by prejudicial extraneous information, may have formed an opinion about the case, or may be otherwise biased or partial, the trial judge must make reasonable inquiries. *See, e.g., United States v. Davis*, 583

F.2d 190 (5th Cir. 1978); *United States v. Dellinger*, 472 F.2d 340 (7th Cir.), *cert. denied*, 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968).

The procedures employed must provide reasonable assurance that prejudice, if present, will be discovered. This was not done in petitioner's case. The pervasive and prejudicial publicity in the unique historical context of this case demanded that the relatively unburdensome questions requested by petitioner's counsel be asked in order to accurately determine bias or partiality.[28] The

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[28] *See generally* American Bar Association, *Standards for Criminal Justice*, § 8-3.5.

The following standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

(b) Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no

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general questions asked by the court were simply not adequate. A juror could in good faith have answered these questions by indicating she or he was impartial without stopping to meaningfully consider the significance or firmness of impressions and opinions gained from the press accounts. Nor were these broad questions specific enough to elicit whether the jurors had gained information or formed opinions about relevant issues regarding petitioner's guilt or the appropriate punishment. *See United States v. Shavers*, 615 F.2d 266, 268 (5th Cir. 1980) (general questions regarding bias in a case involving extensive publicity were too broad to reveal latent juror prejudice). Without adequate questioning, the trial judge was not in a position to make an independent

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> matter how slight the exposure. If the prospective juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

ABA Standards for Criminal Justice 8-3.5 (2d ed. 1980 & Supp. 1986). These standards were cited with approval by this Court in *Nebraska Press Association v. Stuart*, 427 U.S. at 549-50.

judicial determination of the impact of the publicity on the jurors' competence to sit in this capital case.

Petitioner does not dispute that a trial judge retains broad discretion in determining what actions are appropriate to detect juror bias, including the number and particular framing of questions. However, on these facts, the judge was obligated to do something. He did not. The judge was made aware of the pervasive and prejudicial nature of the publicity, and in fact acknowledged that there had been substantial media interest in the case. Counsel noted the exceptional nature and volume of the publicity and sought to have appropriate questions asked. The trial judge rejected these questions and thwarted petitioner's other attempts to obtain a fair and impartial jury. Not only did the court refuse to ask the questions, he denied a motion for a change of venue, denied counsel individual *voir dire*, and refused to sequester the jury during the trial. In sum, he ignored the "strong warning" issued by this Court in *Sheppard v. Maxwell* to take protective measures, *see Nebraska Press Association v. Stuart*, 427 U.S. at 553, and his actions at every turn deprived petitioner of a fair trial in a fair tribunal. *Id.* at 555 ("the measures a trial judge takes or fails to take to mitigate the effects of pretrial publicity [as designated in *Sheppard*] . . . may well determine whether the defendant receives a trial consistent with the requirements of due process").

Respondent will inevitably argue that there was no error because the jurors were asked several perfunctory questions en masse, and all but one member of the panel indicated that they could afford petitioner a fair trial. However, in cases involving prejudicial pretrial publicity,

the determination of a prospective juror's impartiality cannot be made solely on the basis of a juror's assurances that he or she would be impartial. *See Irvin v. Dowd*, 366 U.S. at 728; *Murphy v. Florida*, 421 U.S. at 800.[29] These assurances, in the face of extensive publicity and community feeling regarding a crime, are not sufficient to dispel the possibility of bias, and a trial judge has the constitutional duty to permit a defendant "to demonstrate 'the actual existence of such an opinion in the mind of a juror as will raise the presumption of partiality.' " *Murphy v. Florida*, 421 U.S. at 800 (quoting *Irvin v. Dowd*, 366 U.S. at 723); *see also United States v. Davis*, 586 F.2d 190 (5th Cir. 1978) (after being exposed to prejudicial pretrial publicity a juror "is poorly placed to make a determination as to his own impartiality"); *Delaney v. United States*, 199 F.2d 107, 112-13 (1st Cir. 1952).

At bottom, a juror's impartiality must be determined on the basis of information elicited by the court or counsel regarding the content of the publicity that the juror has been exposed to. Trial counsel sought to probe the jury for meaningful information in petitioner's case but was precluded from doing so. The court's actions prevented any information regarding a disqualifying bias from coming to light, except for the salient fact that most of the panel (and ultimately the jury that convicted petitioner and sentenced him to death) had read about the

[29] As Justice O'Connor noted in her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 221-22: "[d]etermining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."

case and discussed it with other persons. The state cannot now hide behind the jurors' assurances of impartiality.[30] This would make a mockery of petitioner's right to a fair and impartial jury guaranteed by our Constitution. Because the "trial judge did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community," *Sheppard v. Maxwell*, 384 U.S. at 363, petitioner is entitled to a new trial conducted in conformity with the Sixth, Eighth, and Fourteenth Amendments.

[30] This is especially true in light of the fact that the prosecutor was responsible for much of the adverse publicity. For example, he ordered police to release reports that petitioner had been charged with an assault on another inmate. He also made public statements to the press regarding how this case demonstrated that the penal system was the "weak link" in the criminal justice system and that it revealed the need for "swifter capital punishment." Finally, he issued a statement indicating that petitioner had "confessed" to the crime.

This Court has previously warned prosecutors that their statements to the press about a case may deprive a defendant of his right to a fair and impartial jury, and that they should refrain from making any comment which may frustrate this fundamental constitutional right. *Nebraska Press Association v. Stuart*, 427 U.S. at 554-55; *see also United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1903).

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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No. 90-5292

FILED

In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court of Virginia

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

IN A CASE WHERE THE DEFENDANT HAS ABANDONED ANY CLAIM THAT A CHANGE OF VENUE WAS REQUIRED DUE TO PRETRIAL PUBLICITY, AND WHERE NO JUROR HAD FORMED ANY OPINION ABOUT THE CASE, DOES THE CONSTITUTION MANDATE THAT, WHEN ASSESSING JUROR CREDIBILITY ON THE ISSUE OF IMPARTIALITY, A STATE TRIAL JUDGE MUST HAVE HEARD EACH JUROR'S ARTICULATION OF THE CONTENT OF ANY PUBLICITY TO WHICH THE JUROR HAD BEEN EXPOSED?

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No. 90-5193

In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Virginia

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Crime

Dawud Majid Mu'Min, the petitioner, was an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first degree murder conviction. On the morning of September 22, 1988, Mu'Min and five other inmates were transported to the Virginia Department of Transportation's ("VDOT") Dale City Headquarters in Prince William County, Virginia. They were assigned to a work

detail supervised by a VDOT employee. *Mu'Min v. Commonwealth*, 239 Va. 433, 437, 389 S.E.2d 886, 889 (1990).

Mu'Min used grinding equipment at the VDOT shop to sharpen a metal spike, to which he attached a wooden handle. At the lunch break he escaped over a perimeter fence and walked a mile to Ashdale Plaza shopping center. 239 Va. at 437-438, 389 S.E.2d at 890.

Mu'Min entered Dale City Floors, a retail carpet and flooring store, confronted the owner, Gladys Nopwasky, and knocked her to the floor. He then savagely attacked her with the sharp instrument he had fashioned that morning. Mu'Min took all of the money, approximately four dollars, from the desk drawer near the victim's body. He left the store but went back to wipe his fingerprints from everything that he had touched. Mu'Min then returned to his prison work crew at the highway department. 239 Va. at 438, 389 S.E.2d at 890.

A few minutes after the attack, a customer discovered the victim's body on the floor in the back of the store. The victim's blouse and bra had been pushed up to expose her breasts. Her clothes had been removed from her waist down. 239 Va. at 438, 389 S.E.2d at 890. Nopwasky's face was so badly beaten and bloodied that she was unrecognizable. (Tr. 4/17/89, p. 264).[1]

The rescue squad arrived minutes later, but efforts to revive her were unsuccessful. (Tr. 4/17/89, pp. 265, 272). Although medical equipment detected an "electrical rhythm," indicating her heart was beating, no blood

[1] "Tr." refers to the original transcript of trial in the Circuit Court of Prince William County.

remained for her heart to pump. 239 Va. at 438, 389 S.E.2d at 890.

An autopsy revealed that the victim's face, neck, chest and left arm had been stabbed or cut sixteen times with a sharp instrument. Two of these wounds – one on the lower neck and the other on the left upper chest – were fatal. The victim had also suffered numerous "blunt-force trauma injuries" consistent with blows from a fist, causing a laceration on her forehead and bruises over a large portion of her face. 239 Va. at 438-439, 389 S.E.2d at 890.

Mu'Min's statement, admitting that he had killed Nopwasky but claiming he had done so in self defense, was admitted at trial.

Pretrial Publicity

Approximately three months before trial, Mu'Min submitted to the trial court 47 newspaper articles relating to the murder in support of a motion for a change of venue. These articles had been published between September 26, 1988, and January 14, 1989. More than half of them had appeared in the Potomac News, and the remainder in the Washington Post and several other local newspapers. The Potomac News is a daily paper with a circulation of only 25,000 in densely populated Prince William County.

One article stated that Mu'Min had been indicted in the Nopwasky murder and that he was accused of beating a fellow inmate in mid-December 1988. (App. 921).[2]

[2] "App." refers to the appendix filed in the Supreme Court of Virginia which is a part of the record before this Court.

Several focused on the alleged laxity in the supervision of work gangs (App. 922, 930-931) and a post-offense ban on prisoners working in urban work crews. (App. 923-924). The articles included descriptions of the crime and investigation and indicated that Mu'Min had confessed to killing Nopwasky. The articles also revealed that at the time of the Nopwasky offense, Mu'Min was serving a 48-year sentence for first degree murder. (App. 925). One article simply mourned the death of the victim. (App. 928).

On January 30, 1989, the court entertained Mu'Min's motion for a change of venue. (J.A. 8).[3] The defense conceded at the hearing that taken individually the newspaper articles had little impact, but asserted that they collectively created a "pervasive feeling of guilt." (J.A. 9). The trial judge deferred ruling on the venue motion until after making an attempt to seat a jury. Mu'Min voiced no objection to this procedure. (J.A. 14-15).

The Voir Dire

1. Pretrial Motions Relating To Jury Selection

On April 5, 1989, over six months after the offense, and almost three months after the publication of the last article about the case upon which Mu'Min relies, Mu'Min submitted to the trial judge 64 proposed voir dire questions. (J.A. 2-7). He also filed a motion for individual voir dire. (J.A. 15).

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[3] "J.A." refers to the Joint Appendix filed in this Court.

On April 14, 1989, the court conducted a hearing on Mu'Min's request for individual voir dire. The court denied counsel's motion on the ground that placing a prospective juror alone in a courtroom of four attorneys, a number of witnesses and court personnel would be overly intimidating. (J.A. 16-17). Instead, the court ruled that voir dire would begin with questioning the jurors collectively. (J.A. 17). In order to prevent contamination of the entire panel by questions on issues of publicity, the jurors would be broken down into panels of four, and further, if necessary, into panels of two. (J.A. 17).

With regard to Mu'Min's proposed voir dire questions, the court stated its intent to ask the model voir dire questions from the Virginia Judges' Handbook. (J.A. 17). The court then reviewed and approved 24 of the 64 proposed questions, and ruled that the remaining questions were cumulative of the handbook questions. (J.A. 17-41). During the course of the review, several of Mu'Min's questions were allowed by the court over the Commonwealth's objection, and on two occasions the court stated the question would be framed in terms more favorable to the defense than requested by Mu'Min. (J.A. 17, 19, 25, 27-30).

The court refused to allow the following proposed questions:

32. What have you seen, read or heard about this case?

33. From whom or what did you get this information?

34. When and where did you get this information?

38. What did you discuss?

39. Have you formed an opinion or conclusion about this case?

40. What is it?

41. Has anyone expressed any opinion about this case to you?

42. Who? What? When? Where?[4]

The court found that all of these matters would be covered by the model questions, including, "Have any of you acquired any information about the alleged offense or the accused from the news media or other sources, and if so, would that information affect your impartiality in this case?," and "Have you discussed this case with anyone?" (J.A. 31-32). The judge specifically noted that if any prospective juror indicated he had discussed the case, then an appropriate follow-up question would be, "Would what you discussed in any way affect your impartiality in this case?" (J.A. 32). During voir dire, the judge asked virtually the same question as refused question 39: "Have any of you expressed or formed an opinion of the innocence or guilt of the accused?" and "Is

[4] Questions 31, 35, 36 and 37 were in fact permitted by the trial judge (J.A. 31-32), although Mu'Min lists them among those denied. (Def. Br. at 10). These questions were:

31. Have you acquired any information about this case from the newspapers, television, conversations, or any other source?

35. Have you discussed this case with anyone?

36. With whom?

37. When and where?

there any person who has already formed an opinion as to the innocence or guilt of the accused?" (J.A. 48).

2. Group Voir Dire

Seven months after the offense was committed, Mu'Min's trial began with jury selection on April 17, 1989. The judge summoned twenty-six jurors into the courtroom. Speaking to the entire twenty-six, he described the case for them and began asking model voir dire questions from the Virginia Judges' Handbook. The court's group questions spanned 21 transcript pages, and were followed by two pages of questioning by the prosecution and 16 pages of questioning from the defense. (J.A. 42-54, 54-55, 56-66).

The judge asked, among other things, "Are you sensible to any bias or prejudice against either the Commonwealth or the accused?" (J.A. 44). No juror indicated any bias or prejudice. The panel was asked whether anyone had acquired any information about the alleged offense or the accused from the news media or from any other source. (J.A. 46). Sixteen jurors replied that they had. (J.A. 46-47).

Through a series of four questions the jurors were then specifically asked whether any information they had read, seen, heard or acquired from any source would affect their impartiality. (J.A. 48). Only one juror, Dennis Syphrett, responded that he was affected by pretrial information. (J.A. 48). As voir dire continued, the judge asked whether any of the jurors had formed an opinion as to the innocence or guilt of the accused, but none had. (J.A. 48). The jurors were then queried whether, in light of

any prior knowledge about the case, any could not enter the jury box with an open mind and wait until the entire case was presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused. Only juror Syphrett indicated he did not feel that he could sit with an open mind because he had already formed an opinion about the case. Syphrett was dismissed *sua sponte* by the trial judge. (J.A. 48-49).

After Syphrett was excused, a replacement juror was chosen and was asked the same questions previously posed to the entire panel. (J.A. 49-52). Replacement juror Tsou indicated that he was not sensible of any bias or prejudice and that the only information he had received about the case came from a brief conversation from which he learned only that a murder trial was scheduled. Tsou said this information would not affect his impartiality. (J.A. 51-52). Tsou had formed no opinion as to guilt or innocence, and felt he could hear the case with an open mind. (J.A. 52).

Finally, the judge *twice* asked the twenty-six panel members if anyone knew of any reason whatever why he or she should not sit as a juror. The group indicated that it had no such knowledge. (J.A. 52, 54).

After questioning of the entire panel (J.A. 42-66), Mu'Min moved to strike for cause any member of the panel who indicated prior knowledge of the case. The motion was denied by the court "at this time." (J.A. 68-69). The court ruled that subsequent questioning in panels would provide the opportunity to further explore the impartiality of the jurors. (J.A. 69).

At the conclusion of group voir dire, the court also denied Mu'Min's request for a change of venue, and the court expressly noted the lack of impact which the pretrial publicity had had on the prospective jurors. (J.A. 71). Mu'Min subsequently abandoned his venue claim on direct appeal to the Supreme Court of Virginia.

3. Voir Dire In Panels

The court then conducted further voir dire of the prospective jurors in panels of four. Panel voir dire spans 106 transcript pages.

On request of the defense, the court allowed questions that the defense had forgotten to ask of the entire group. (App. 272-273). On at least seven separate occasions during panel voir dire, the judge assisted the defense with follow-up questions that expanded the scope of the question asked by the defense, required a more specific response from the panel, clarified a point for the defense, or covered a topic the defense had covered with one panel but neglected to cover with another. (J.A. 72-73, 74-75, 83, 87-88, 90; App. 275-277, 280-281, 287, 291-294, 328).

Defense counsel asked the first panel of four jurors whether they had discussed the case with anyone. Three of the four jurors said that they had done so with their wives when reading the newspaper. (J.A. 72). None of the four had formed an opinion based on what they had discussed, heard or read, and all of them indicated that they were neither biased nor prejudiced against the defendant. (J.A. 72). All four swore that they could enter the jury box with an open mind and wait until the entire

case was presented before reaching a conclusion as to guilt or innocence. (J.A. 72-73).

Out of the second panel of four jurors, one juror, Ms. Walters, acknowledged a discussion with her supervisor, who lived on the victim's block. (J.A. 73). The court and defense counsel both asked questions which elicited from Ms. Walters the content of discussion, and she explained that her supervisor had expressed no opinion about the case, but simply had said that she had known the victim and was very sorry this had happened. (J.A. 73, 75). This discussion did not cause her to have an opinion on the matter nor create any bias or prejudice. (J.A. 73-75). She indicated that she could perform jury duty with an open mind, wait for all the evidence before reaching a conclusion as to guilt or innocence, and reach a fair and impartial verdict based on the law and the evidence. (J.A. 74-75). The remaining panelists indicated that they had reached no opinion in the case based upon what they had read in the newspapers, and were sensible of no bias or prejudice as a result of what they had read. (J.A. 79).

Out of the third panel of four jurors, only Nanci Haines had discussed the case with anyone, and that person had not stated an opinion. (J.A. 76). This discussion had not caused Haines to form an opinion, nor did it prejudice her. (J.A. 76-79). However, Haines was struck for cause on defense motion that she was "not as frank as she could be" concerning the effect of her feelings toward members of the Islamic Faith and toward defense counsel. (J.A. 81). While the three remaining members of this panel had read something about the case, they had reached no opinion and were not biased as a result of

what they had read. (J.A. 79). The panel members indicated that they could render an impartial verdict based on the law and the evidence. (J.A. 80).

No member of the fourth panel of four prospective jurors had discussed the case with anyone. (J.A. 82). One member, Mr. Suter, had seen headlines about the case, but was not biased or prejudiced as a result of the headlines. (J.A. 82). No juror had been exposed to an opinion about the case. (J.A. 83). All four said they could decide the issues with an open mind and wait until the entire case was presented before reaching an opinion. (J.A. 83-84).

No member of the fifth panel of four jurors had discussed the case with anyone, formed an opinion about the case, or been exposed to newspaper accounts creating any bias or prejudice on their part. (J.A. 85). All of them were satisfied that they could enter the jury box with open minds and wait for the presentation of the entire case before reaching a conclusion as to innocence or guilt. (J.A. 85).

Out of the sixth panel of four jurors, Martha Felmley and Barney Rish said they had discussed the case. (J.A. 86). Felmley was removed from the jury panel because of her inability to impose a death sentence. (J.A. 86-87). Rish said he had discussed the case "just casually." (J.A. 86). He stated that he had not formed an opinion based on his casual discussions. Neither Rish nor the two remaining jurors was aware of any bias or prejudice about the case. (J.A. 87). Rish and the two remaining jurors indicated that, regardless of any prior knowledge, they could enter the jury box with open minds and wait until the entire

case was presented before reaching a conclusion as to guilt or innocence. (J.A. 88).

Voir dire continued with a seventh panel consisting of the final two jurors from the original twenty-six summoned by the trial judge. One juror, Donna Deiotte, a newspaper reporter, stated that she had discussed the case with someone who had expressed an opinion. Neither she nor the other juror had formed an opinion nor developed any bias as a result of having read newspaper articles or engaged in discussions. (J.A. 88, 89). However, Deiotte equivocated as to whether she could enter the jury box with an open mind and wait until the case was presented before reaching a decision. Consequently, she was removed from the jury panel *sua sponte* by the trial judge. (J.A. 90; App. 329).

The trial judge summoned three additional jurors and all were asked the same questions the judge had asked the original jury panel. One of the three jurors, Fred Farnham, was removed for cause based upon his statement that upon a finding of first-degree murder, he could not consider a penalty less than the death penalty. (App. 339-341). The remaining two had read newspaper articles about the case but had not discussed the matter with anyone. Neither was sensible of any bias or prejudice as a result of having read the newspaper articles. Both indicated that they could keep an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence. (J.A. 90).

The final prospective juror, Malcolm Friend, was asked the same questions the judge had asked the original panel. He stated he had not acquired any information

about the case from any source, formed or expressed an opinion as to Mu'Min's guilt or innocence, or heard the case discussed in any manner. He knew of no reason why he could not sit and render a fair and impartial decision based upon the law and the evidence. (J.A. 93-94; App. 364-380).

At this point the judge declared that all twenty-six prospective jurors stood indifferent in the case, and the remaining replacement jurors were excused. (App. 380-381). The panel members were returned to the courtroom where six each were peremptorily struck by both the Commonwealth and Mu'Min. The remaining fourteen were sworn and seated. The first 12 sat as the deliberating jury, and the two alternates took no part in either the determination of Mu'Min's guilt or innocence, or his sentence. (App. 849-850; Tr. 4/24/89, pp. 97-98).

SUMMARY OF ARGUMENT

The conduct of voir dire, including the number and scope of questions to be asked, is a matter within the sound discretion of the trial court. That discretion is reviewable only for manifest error, and there is no such error in this case.

The Constitution does not require that prospective jurors be asked the content of pretrial publicity to which they have been exposed. The relevant question is not what they remember about such publicity, but whether they have formed such fixed opinions that they cannot try the case impartially. Only in very narrow circumstances, where potential prejudices, such as racial bias or

suspicion of disloyalty to the United States, are inextricably bound up in the facts of the particular case in such a way as to intensify those potential prejudices, has this Court held that the Constitution requires that a defendant be allowed to inquire on voir dire into specific areas of possible prejudice. Mu'Min's case clearly does not present such a narrow circumstance.

Moreover, even in the limited instances when this Court has held that the opportunity for specific voir dire inquiry is guaranteed by the Constitution, those rulings have mandated only questions pertaining directly to the prospective juror's assessment of his or her impartiality when confronted with the allegedly prejudicial issue, *not* the juror's underlying factual knowledge related to the issue. The inquiry Mu'Min seeks is thus far more extensive and intrusive than any this Court has previously required under the Constitution.

The fact that this is a capital case does not constitute a special circumstance justifying the rule Mu'Min advocates. Mu'Min cannot rely on the Eighth Amendment because he did not preserve this argument in the Supreme Court of Virginia. Moreover, the considerations dictating that a capital murder defendant be allowed to inquire on voir dire about possible racial prejudice do not apply to inquiries about possible bias resulting merely from exposure to pretrial publicity. And the type of inquiry Mu'Min seeks would be far more intrusive than the inquiry into racial prejudice that this Court has required in interracial capital cases.

Voir dire questions of the type Mu'Min advocates also may result in adverse consequences for the defense.

In addition, they would substantially change the nature of trial practice in jurisdictions which do not allow them, virtually mandate individual voir dire for the first time, and exacerbate the existing problems of delay, congestion, and expense which plague criminal courts.

Finally, the voir dire in Mu'Min's case was conducted carefully and even-handedly. Although eight of the trial jurors had read or heard something about the case, none had formed *any* opinion about it, much less an opinion which could not be set aside in accordance with the instructions of the court. In sum, Mu'Min was tried by a fair and impartial jury, and that is all the Constitution requires.

ARGUMENT

THERE IS NO CONSTITUTIONAL RIGHT TO "CONTENT" QUESTIONS DURING VOIR DIRE IN A CRIMINAL CASE GENERALLY, OR IN A CAPITAL CASE SPECIFICALLY.

A. The Conduct Of Voir Dire Is Left To The Discretion Of The Trial Judge.

In *Ristaino v. Ross*, 424 U.S. 589, 594 (1976), this Court observed that "[t]he Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him." In *Connors v. United States*, 158 U.S. 408, 413 (1895), the Court noted that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound

discretion." Even where this Court has recognized a constitutional requirement that a specific voir dire inquiry must be allowed when requested, the trial court retains discretion over how the inquiry is conducted and what conclusions are reached. *See, e.g., Turner v. Murray*, 476 U.S. 28, 37 (1986).

In *Reynolds v. United States*, 98 U.S. 145, 156-157 (1879), this Court held that a trial court's findings of impartiality from observations of jurors were entitled to great weight. *Accord Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *Wainwright v. Witt*, 469 U.S. 412, 426 (1985); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). As this Court noted in *Wainwright v. Witt*, "the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind." 469 U.S. at 428. The question of partiality of an individual juror is a two-fold question of historical fact: "Did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton*, 467 U.S. at 1036. Because "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province," the trial judge's determination of such matters is entitled to deference on direct appeal. *Witt*, 469 U.S. at 428.[5]

Despite what might be shown by the printed record in a case, "there will be situations where the trial judge is

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[5] This is why such findings are also entitled to a presumption of correctness in habeas corpus cases under 28 U.S.C. § 2254(d). *Witt*, 469 U.S. at 429.

left [after voir dire] with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 425-26. The converse also is true: there will be situations where the trial judge is left after voir dire with the definite impression that a prospective juror would be *able* to faithfully and impartially apply the law.

"This is why deference must be paid to the trial judge who sees and hears the juror," *Witt*, 469 U.S. at 426, and this is why a trial judge's conclusions as to juror bias may be overturned only for "manifest error." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).[6]

This exacting standard applies also to capital cases where, "as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ." *Witt*, 469 U.S. at 423. Nor does the standard change just because "pervasive media publicity" is claimed, which this Court has recognized "now arises so frequently in the trial of sensational criminal cases." *Patton*, 467 U.S. at 1031.

The findings of the trial judge here, no less than those made by the trial judges in *Witt* and *Patton*, should thus be upheld by this Court, absent a showing by the defendant of manifest error. *See Reynolds*, 98 U.S. at 157 (burden on defendant seeking exclusion of juror to

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[6] *Irvin* was a change of venue case, but the same standard as to impartiality applies to questions of whether jurors are subject to exclusion for cause because of a lack of impartiality. *Witt*, 469 U.S. at 429.

demonstrate partiality). There was no manifest error in this case.

B. The Constitution Does Not Provide A Right To "Content" Questions.

Even where there has been substantial pretrial publicity in a case, jurors are not required to be wholly ignorant of the facts and issues presented. *Irvin*, 366 U.S. at 722. *"The relevant question is not whether the community remembered the case,* but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, 467 U.S. at 1035 (emphasis added). *See also Irvin*, 366 U.S. at 723.

In *Patton*, this rule was applied in the context of a retrial after the defendant's conviction had been reversed by the Supreme Court of Pennsylvania for erroneous admission of his confession. The publicity prior to the second trial had "revealed [the defendant's] prior conviction for murder, his confession, and his prior plea of temporary insanity, information not admitted into evidence at [re]trial." *Patton*, 467 U.S. at 1029. The pretrial publicity in *Patton* was thus of far greater potential prejudice to the defendant than was the publicity in Mu'Min's case. Moreover, eight of the fourteen jurors who tried the defendant admitted that "at some time they had formed an opinion as to [the defendant's] guilt." *Patton*, 467 U.S. at 1029-1030. None of Mu'Min's jurors had formed any opinion about the case. If recollection of the case by the community, and hence by the venire, was insufficient to disqualify the jurors in *Patton*, it clearly was insufficient in Mu'Min's case.

Mu'Min's argument is founded upon two faulty unspoken premises: first, that the more pretrial publicity a juror has read or heard about a case, the more likely he or she is to be prejudiced against the defendant, and second, having become thus prejudiced, a prospective juror will be unwilling or unable to acknowledge his or her bias. Neither of these premises is sound.

The assumption that exposure to pretrial publicity automatically affects a juror's impartiality is not borne out by experience, even when such publicity reveals a defendant's prior criminal record. *See, e.g., Murphy v. Florida*, 421 U.S. 794, 800-801 (1975) (four of six jurors who had prior knowledge of defendant's criminal record "volunteered their views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime . . . ."). To entertain this assumption is to violate this Court's teaching in *Murphy*:

> We must distinguish between mere familiarity with petitioner or his past and an actual disposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. [Citations omitted]. To ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who were well known in the community, whether they be notorious or merely prominent.

421 U.S. at 800, n.4.

In short, the relevant inquiry is not the content of what prospective jurors have read or heard, but rather what effect the information had on them. The potential

juror's impartiality in the face of exposure to publicity will depend on his or her unique critical thinking skills and independence of mind. Such qualities may well be found to a greater extent in people who follow news accounts more closely and consistently, and thus would be prepared to recite greater familiarity with pretrial news accounts. Any direct correlation between a potential juror's exposure to pretrial publicity and his or her partiality is thus illusory.

A broad assumption that prospective jurors cannot or will not acknowledge their publicity-engendered bias against the defendant is likewise unfounded. Anyone who hides his bias against a defendant by untruthful answers on voir dire will also likely conceal the extent of his knowledge about the case from pretrial publicity. The inquiry which Mu'Min advocates would be wasted on such individuals.

Moreover, such basic mistrust of jurors runs counter to the fundamental belief upon which the constitutional guarantee of trial by jury is premised, "that juries will follow the law, that they will not convict on mere suspicion but will instead require proof beyond a reasonable doubt," *United States v. Scarfo*, 850 F.2d 1015, 1025 (3d Cir. 1988), *cert. denied*, 488 U.S. 910 (1988), *citing Richardson v. Marsh*, 481 U.S. 200, 206 (1987), and the well-founded belief in "the determination, the sense of responsibility and the individual integrity by which men judge men." *Dennis v. United States*, 339 U.S. 162, 172 (1949). *See also Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). Whether these principles are rooted in absolute truth or in the

need for practical accommodations of competing interests, *see Richardson*, 481 U.S. at 211, they militate strongly against the assumption Mu'Min urges on the Court.

Common experience supports these principles upon which our system is founded, and not the cynical assumption which Mu'Min would have this Court make. Juror Syphrett indicated he did not feel that he could sit with an open mind, and was dismissed *sua sponte* by the trial judge. (J.A. 48-49). Nothing in the record supports an assumption that other prospective jurors suppressed or concealed a similar disability, and the law requires a presumption of impartiality in the absence of such a record. Indeed, experience shows that even racial prejudice is sometimes disclosed by jurors. *See Ristaino*, 424 U.S. at 593.

None of this Court's prior decisions supports Mu'Min's position.[7] In *Rideau v. Louisiana*, 373 U.S. 723

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[7] The lower federal courts that have addressed the question are split on the issue of content questions. While the Eleventh Circuit does not require such questions at all, *United States v. Montgomery*, 772 F.2d 733, 735-736 (11th Cir. 1985), others have required only a limited inquiry into exposure to publicity. *United States v. Poludniak*, 657 F.2d 948, 956 (8th Cir. 1981), *cert. denied, sub nom. Weigand v. United States*, 455 U.S. 940 (1982); *United States v. Haldeman*, 559 F.2d 31, 65-66 (D.C. Cir. 1976), *cert. denied, Erlichmann v. United States*, 431 U.S. 933 (1977). The Seventh Circuit has held that questioning must be specific enough to alert the *jurors* to the problem of pretrial publicity in evaluating their own fitness to serve. *United States v. Dellinger*, 472 F.2d 340, 375-376 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). The Fifth and Ninth Circuits have required

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(1963), *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court presumed prejudice in the circumstances under which the trials occurred. In *Rideau*, a twenty-minute film of the defendant's dramatically staged confession had been broadcast by television three times in the community where the crime and trial had occurred. *Sheppard* involved extremely inflammatory publicity, and both *Sheppard* and *Estes* involved trials conducted in a "circus" atmosphere. *See Murphy*, 421 U.S. at 799. Nothing even approaching a "circus" atmosphere prevailed in Mu'Min's case and the case was tried with all due solemnity.

This Court has held that there is a constitutional requirement that particular lines of voir dire inquiry be permitted only in very limited circumstances. In *Dennis v. United States*, 339 U.S. 162 (1950), and *Morford v. United*

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detailed content questioning. *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971). *But see United States v. Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975).

While most states have not specifically ruled on the issue, three states in addition to Virginia have expressly rejected a rule requiring content questions. *State v. Lucas*, 328 S.E.2d 63, 64-65 (S.C. 1985), *cert. denied*, 472 U.S. 1012 (1985); *Commonwealth v. Burden*, 448 N.E.2d 387, 393 (Mass.App. 1983); *Commonwealth v. Dolhancryk*, 417 A.2d 246, 248 (Super. Ct. Pa. 1979). The statutes or rules of court of several other states apparently would permit a trial court to decline to ask content questions. *See* Ind. Code Ann. § 35-37-1-5 (Burns 1985 and Supp. 1990); Neb. Rev. Stat. §§ 25-1636 and 29-2006 (1989); Okla. Stat. Ann. Tit. 22, § 662 (West 1969 and Supp. 1990); Tex. Crim. Proc. Code Ann. § 35-16 (Vernon 1989 and Supp. 1990); Utah R. Crim. Proc. 18 (1990); Wyo. Stat. § 7-11-106 (1987 and 1990 Supp.). *See also Hopt v. People*, 120 U.S. 430 (1887).

States, 339 U.S. 258 (1950), fundamental fairness required that a Communist and a recordkeeper in the National Council for American-Soviet Fellowship, Inc., both accused of failing to comply with compulsory process from the House Committee on Un-American Activities, be allowed to question government employees on their respective jury panels about the potential influence of the "Loyalty Order" such employees had been forced to take upon their ability to judge the cases fairly and impartially.

These decisions, however, were highly specific with reference to both the defendant and the prospective juror. They turned upon the defendant's having made a preliminary showing of a direct personal interest on the part of the juror in avoiding any appearance of disloyalty to the federal government. This was an interest which might have influenced jurors not to acquit the defendants of the crimes with which they were charged. Upon such a showing, *Dennis* and *Morford* required that the defense be allowed to make direct inquiry into feelings of bias. Clearly, however, even these two cases did not come close to requiring the type of inquiry which Mu'Min seeks.

Likewise in *Ham v. South Carolina*, 409 U.S. 524 (1973), this Court recognized a constitutional right to inquire whether prospective jurors entertained racial prejudice against Black people in a case where the defendant, a Black person, maintained that he had been unjustly accused of an offense in retaliation for his civil rights work on behalf of Black people. Fundamental fairness required such a line of questioning because racial issues "were inextricably bound up with the conduct of the trial," and because "Ham's reputation as a civil rights

activist and the defense he interposed were likely to intensify any prejudice that individual members of the jury might harbor." *Ristaino*, 424 U.S. at 597. Significantly, the only questions *constitutionally* required were ones that directly addressed the jurors' *attitudes* towards the issues. Questions calling upon them to divulge the content of their knowledge of civil rights groups, Blacks, or the defendant in particular were not required.[8] *Ham*, 409 U.S. at 525 n.2 and 527.

Thus, a constitutional right to pursue a specific line of inquiry on voir dire has been limited to situations where potentially prejudicial matters, such as racial prejudice or suspected disloyalty to the United States, have been uniquely involved in the facts of the particular case in such a way as to inflame or "intensify" the jurors' possible prejudices. By contrast, pretrial publicity exists in every major criminal case. The jurors examined in this case were no different from any juror who reads or hears news accounts in any case, and the news accounts were not uniquely involved, or "inextricably bound up" in the facts of Mu'Min's case in such a way as to inflame or "intensify" any juror's possible bias.

The voir dire employed by Chief Justice Marshall to assure a fair trial to Aaron Burr in the face of extensive publicity, which Mu'Min acknowledges this Court has cited with approval many times, included no general questions concerning what publicity prospective jurors had read, but only "Have you made up your mind on the

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[8] For many reasons, racial prejudice in jurors is a matter of far greater concern than bias engendered from news accounts. (See Part C2 below).

case, or on the guilt of Colonel Burr, from the statements you have seen in the papers or otherwise?" and "Have you formed and expressed (or delivered) an opinion on the guilt or innocence of Colonel Burr. . . . ?" *United States v. Burr*, 25 Fed. Cas. No. 14, 693 (Text of proceedings), p. 58 (C.C. Va. 1807).

After determining that most jurors in Mu'Min's case had previously heard of the case, the trial court asked the jurors whether that information caused them to form an opinion and whether they could decide the case only on the evidence. No juror had formed an opinion, and they all indicated they could render their verdict only on the evidence presented. Clearly, this voir dire was thorough enough to permit the court to determine, without regard to the content of the information, that the jurors were impartial.[9] *See Beck v. Washington*, 369 U.S. 541, 557 (1962); *Ristaino*, 424 U.S. at 596-97 (specific questioning only required if circumstances of the case strongly support a need).

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[9] Mu'Min suggests (Pet. Br. at 30, n.25) that greater latitude in defense questioning must be granted to permit the intelligent exercise of peremptory challenges. The purpose of voir dire, however, is to provide the assurance that the defendant receives a fair and impartial trial, not to help the defense make discretionary challenges. Indeed, "peremptory challenges . . . are not required by the Constitution." *Ross*, 487 U.S. at 89. Because peremptory challenges are a creature of statute and rules of court only, it is for the states "to define their purpose and the manner of their exercise." *Id*. The absence of a constitutional basis for peremptory challenges precludes a constitutional requirement that voir dire be structured to aid the defense in making discretionary challenges. *Cf. Pennsylvania v. Finley*, 481 U.S. 551 (1987) (when a state chooses to act in an area of state discretion, the federal Constitution does not dictate the form of state assistance).

C. The Constitution Does Not Require That "Content" Questions Be Asked During Voir Dire In A Capital Case.

1. Insofar As Mu'Min's Claim Is Founded Upon The Eighth Amendment, It Is Not Properly Before The Court.

Petitioner asserts that he was constitutionally entitled under the Eighth Amendment to ask the proposed content questions. (Pet. Br. 16). The record establishes, however, that Mu'Min presented no Eighth Amendment claim on direct appeal. Accordingly, any such argument is jurisdictionally barred from review by this Court. *See Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); Rule 14.1(h).

On direct appeal, Mu'Min did not assign as error any Eighth Amendment claim. In his brief, at the outset of a nine page argument on the voir dire issue, petitioner made a one sentence reference to the greater reliability required by the Eighth Amendment in death penalty cases. (Def. Br. 12). This "generic reference" was never subsequently developed in any manner whatever. *Cf. Taylor v. Illinois*, 484 U.S. 400, 401 n.9 (1988) (generic reference to Fourteenth Amendment not sufficient to preserve constitutional claim based on unidentified provision of Bill of Rights); *Beck*, 369 U.S. at 550-553 (constitutional contention not made at trial, not listed in assignments of error, and set forth in one sentence of 125 page brief, considered waived by state supreme court; not entertained by United States Supreme Court). Instead, Mu'Min presented arguments focusing exclusively upon state law issues and his rights under the Sixth and Fourteenth Amendments to a trial by an impartial jury. *See generally*

Witt, 469 U.S. at 423 (exclusion of jurors based on views of death penalty is grounded on Sixth Amendment right to trial by fair and impartial jury, rather than on Eighth Amendment safeguard against cruel and unusual punishment).

The Supreme Court of Virginia clearly did not construe his arguments as raising any Eighth Amendment issue; in its opinion, the Court referred exclusively to alleged violations of due process and Mu'Min's right to trial by an impartial jury. 239 Va. at 442, 389 S.E.2d at 392. Indeed, in rejecting petitioner's arguments, the Supreme Court of Virginia never once cited the Eighth Amendment or any Eighth Amendment case.[10] Under these circumstances, petitioner is jurisdictionally barred from relying upon the Eighth Amendment in this Court.[11]

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[10] Thus, this case is distinguishable from *Taylor v. Illinois*, 484 U.S. 400 (1988), in which this Court rejected Illinois' argument that the petitioner's Sixth Amendment claim was barred because it had not been raised in the state courts. As the Court noted in *Taylor*, the petitioner had relied upon several of its prior Sixth Amendment cases in his state appellate brief. 484 U.S. at 401 n.9. Mu'Min's brief on direct appeal as well as the opinion of the Supreme Court of Virginia make clear that nothing comparable occurred in this case.

[11] Mu'Min is not free to argue that the Supreme Court of Virginia misinterpreted the scope of his argument. Petitioner had a duty to petition the state Supreme Court for a rehearing if he thought the Court had overlooked an Eighth Amendment claim. *See* Rule 5:39 of the Rules of the Supreme Court of Virginia.

2. Mu'Min's Reliance Upon *Turner v. Murray* Is Misplaced.

In *Turner v. Murray*, 476 U.S. 28, 35 (1986), this Court held that, because of the degree of discretion afforded a capital sentencing jury, "there is a unique opportunity for racial prejudice to operate but remain undetected." Thus, where a capital defendant is charged with an interracial crime, he is constitutionally entitled to question prospective jurors on the issue of racial prejudice.[12] 476 U.S. at 36-37.

The *Turner* decision focused specifically on the *sentencing discretion* of the jury, and this Court vacated Turner's death sentence *only* because it found "an unacceptable risk of racial prejudice infecting the capital sentencing proceeding."[13] Turner's adjudication of guilt was left fully intact. 476 U.S. at 37.

Moreover, while the jurors in *Turner* were asked on voir dire if they were aware of any reason why they could not be impartial, and all responded in the negative, at the time they were asked this question the prospective jurors "had no way of knowing that the murder victim was white." 476 U.S. at 31. Consequently, they had no way of knowing that Turner was charged with an interracial offense.

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[12] In Mu'Min's case, the issue of possible racial bias was fully explored during voir dire (J.A. 4, 28-31; App. 281-282, 287-288, 316, 323, 354-355, 379-380), and petitioner makes no allegation to the contrary.

[13] At his resentencing trial, Turner was again sentenced to death. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017 (1988).

In Mu'Min's case, on the other hand, when the jurors were asked whether they had formed an opinion about the case and whether they could lay aside everything they had heard or read and decide the case solely on the evidence, they possessed all the information they needed – in terms of their exposure to publicity – to give a full and truthful answer. Thus, while there was reason in *Turner* to question or doubt the accuracy of the jurors' avowals of impartiality, no such reason exists here.

Beyond the extremely narrow context of the possibility of latent racial bias infecting a capital sentencing decision, *Turner* did nothing to alter the general principle that the responsibility for conducting voir dire, and for assuring the selection of fair and impartial jurors, is firmly committed to the sound discretion of the trial judge. There are a number of compelling reasons why *Turner* should not be extended beyond the confines of a capital case where latent racial bias might be a factor.

First, in our society racial prejudice is widely considered to be morally reprehensible, whereas the mere forming of an opinion or attitude about a case based on news reports carries no such stigma. More direct questioning on the subject of racial prejudice is thus justified in order to overcome a juror's hesitancy to subject himself to public obloquy by an admission of racial prejudice.

Second, racial prejudice is likely to be a long-standing and largely unconscious attitude, whereas a viewpoint based on news reports is only recently acquired and consciously processed in the mind of the juror. Therefore,

more direct voir dire is justified in order to call the juror's attention to his or her own racial attitude.[14]

Third, racial prejudice will be more difficult for a juror to set aside in accordance with the trial court's instructions than will an impression engendered only by news accounts. As a result, racial prejudice presents a far greater threat to the integrity of the jury verdict than does information from news accounts because the effect of racial prejudice on a juror's decision will *always* be destructive of a fair judgment. Racial prejudice will always distort the juror's judgment; there is no legitimate role that racial prejudice can play in jury deliberations. By contrast, information acquired from news accounts is more easily countered by questioning on voir dire, and by the evidence introduced at trial and instructions of the court.

Finally, this Court characterized the required voir dire in *Turner* as "minimally intrusive," and stated that, "as in other cases involving 'special circumstances,' the trial judge retains discretion as to the form and number of questions on the subject. . . . " 476 U.S. at 37. *Turner* requires nothing more than that the jurors be informed of the facts which might *trigger* their prejudice, and then that they be asked if in fact a prejudice exists in their mind.

What Mu'Min seeks, however, is an inquiry far more intrusive than that mandated by *Turner*. Comparable "content" questions in the *Turner* context would have included questions such as: "What have your experiences been with Black people? What were you taught as a child

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[14] Calling the juror's attention to such bias, so that it may be acknowledged, is the purpose of such questions, rather than challenging the juror's denial of bias. *See Ham*, 409 U.S. at 527.

about Black people? Did you have Black friends as a child? Do you have Black friends now? Have you ever entertained Black guests in your home? Do Black people attend your place of worship? Did you go to school with Black people? Have you ever been frightened by a Black person?" No such intrusive inquiry was constitutionally mandated by *Turner*, nor should it be.

The Constitution simply does not require psychoanalysis of the thought process by which jurors arrive at the determination that they entertain no bias or prejudice. Nor does the Constitution require that the trial judge possess the information gleaned from such a psychoanalysis when the judge assesses the jurors' swearing under oath that they are impartial.

D. Sound Reasons Militate Against Requiring "Content" Questions.

Although this Court in *Ham* and *Turner* has required some voir dire questions, upon defense request, regarding the possibility of racial bias, the Court has also acknowledged that there are risks associated with such questioning. As Justice Powell pointed out in dissent in *Turner*, specific inquiries about racial bias as opposed to more general inquiries about bias may have the undesirable result of suggesting to jurors that considerations of race are relevant to the issues at trial. 476 U.S. at 49, n.6 (Powell, J., dissenting). In a similar manner, calling attention to what was heard or read outside of court might suggest to a juror that out-of-court statements are relevant.

In addition, such questioning could serve to refresh a juror's recollection of the news accounts and make them

more vivid in his mind. This is especially true in this case, where the petitioner relies solely on news accounts occurring three to seven months before trial. If one accepts Mu'Min's premises that a juror's recollection of news accounts about the case will prejudice the defense and that a juror's assurances of impartiality cannot be trusted, then not only are the juror's statements concerning his or her exposure to news accounts likewise suspect, but the net effect of the questions Mu'Min contends should be asked would be to have the juror go into the trial with a more vivid recollection of the allegedly prejudicial news accounts than he would have without the questions.

Furthermore, to require a juror to delineate the content of news items he has read or heard about the case and then permit him to sit on the jury might unwittingly suggest to him the existence of other more damaging news accounts. The juror might conclude that some such accounts were *so* prejudicial that, had he revealed a familiarity with them, he would have been removed for cause.

Moreover, while the rules established by *Ham* and *Turner* requiring inquiry into racial prejudice were susceptible of bright-line standards, no such bright-line test is possible in this case. On the contrary, Mu'Min emphasizes the "unique" facts of this case and acknowledges in effect that his position hinges upon the quantum of pretrial publicity in this case, and this case alone. Criminal cases, both capital and non-capital, run the gamut from obscurity to overwhelming sensationalism, with no obvious point in the spectrum to establish a brightline standard. The applicability of the rule would ultimately be a question for the discretion of the trial judge, the very

discretion which Mu'Min would have this Court now remove.

A final major consideration is the practical effect that such a rule would have on state courts. While there is no constitutional right to individual voir dire of jurors, requiring the sort of "content" questions advocated by Mu'Min would effectively require individual voir dire, otherwise the "content" revealed by one juror could "contaminate" all other jurors on that panel. This Court has repeatedly emphasized, however, that voir dire and the determination of impartiality are matters particularly within the province of the trial judge. *See, e.g., Ristaino,* 424 U.S. at 594-95. A ruling in favor of Mu'Min would inevitably result in the type of marathon voir dires which already are permitted in some states, but which states like Virginia have scrupulously and appropriately endeavored to avoid.[15]

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[15] California is one state which has adopted an approach to voir dire similar to that which Mu'Min advocates. *See People v. Williams*, 29 Cal.3d 392, 628 P.2d 869 (1981). Yet the results of a survey published by the National Center for State Courts indicate that, among California lawyers and judges, "everybody except criminal defense lawyers" believes criminal voir dire in California to be a "horrible perversion of the justice system," and, even among defense lawyers, the rate of attorney satisfaction with jury selection was no higher in California than in Colorado, where the length of voir dire is closely monitored in the trial judge's discretion, and voir dire time limits of 30 to 45 minutes were commonly reported. Even within California, the highest rate of attorney satisfaction with jury selection was reported in Monterey, where an informal local policy limits the length and extent of voir dire. *See* Sipes, *On Trial, The Length of Civil and Criminal Trials* 42-45 (National Center for State Courts, 1988).

Moreover, this rule would not be limited to issues of pretrial publicity. If a juror had any knowledge of the case, the details of such knowledge would, under the same principles, have to be disclosed during voir dire. Voir dire in criminal cases conducted in small towns or rural localities, where many of the jurors had known the defendant his entire life, would require each juror to provide his or her recollection of the defendant's life story. Plainly, the operation of such a rule would change the nature of criminal trials in a major portion of the nation, making the voir dire longer than the trial itself.

In 1971, then Chief Justice Warren E. Burger, in a speech to the National Conference on the Judiciary in Williamsburg, Virginia, commented that selection of a jury has "become in itself a major piece of litigation consuming days or weeks," and predicted that American citizens would soon "lose patience with the cumbersome system." Los Angeles Times, Mar. 13, 1971, § 7 at 17, col. 1. The rule advocated by Mu'Min would unquestionably exacerbate the existing problems of delay, congestion, and expense which continue to plague state criminal courts.

E. The Trial Court Did Not Abuse Its Discretion In Impanelling Mu'Min's Jury.

The trial judge heard the veniremen's answers during voir dire, observed their demeanor and determined their credibility. He concluded that those who were to serve on Mu'Min's jury were impartial. (Tr. 4/17/89, p. 182). This factfinding is owed the same degree of deference historically given to other findings of fact made by a trial court.

1. The Jury Selection Process Was Thorough And Fair.

The voir dire in Mu'Min's case was conducted painstakingly, carefully protecting the interests of the defendant. Group voir dire spanned 39 transcript pages (App. 221-262), and small panel voir dire spanned an additional 106 transcript pages. (App. 274-381). On at least seven separate occasions during panel voir dire, the trial judge assisted the defense with follow-up questions that expanded the scope of the question asked by the defense; required a more specific response from the panel; clarified a point for the defense; or covered a topic the defense had covered with one panel but neglected to cover with another. (App. 275-277, 280-281, 284-285, 287, 291-294, 319, 328). The court allowed the defense to ask jurors if they were biased against members of the Islamic faith (J.A. 77), whether they would be able to judge the case fairly in light of the facts that the defendant was Black, the victim was white, and the victim had been found nude from the waist down (J.A. 76), and whether they had ever been the victim of a racial incident involving a Black person. (J.A. 84, 86). The trial court struck Juror Haines for cause, upon Mu'Min's motion and over the prosecution's objection, because the court felt she had not been as frank as she could have been concerning her opposition to the Islamic religion and her prejudice against defense counsel arising from a previous case. (J.A. 77-78, 81).

When a juror indicated that her discussions with her supervisor might unconsciously prejudice her judgment, Mu'Min and the trial court both inquired into the substance of her discussions with her supervisor. (J.A. 73-75).

Mu'Min was also allowed to inquire into how jurors' judgment would be affected by the extent of their acquaintances with the victim (J.A. 85), and a witness. (J.A. 89). In questioning a juror who was employed as a newspaper editor, the court asked her if she had attended any news briefings or conferences concerning the Mu'Min case. (App. 328). She had not, but when she equivocated about her ability to judge the case fairly, the court struck her *sua sponte*. (App. 329). The court rejected any suggestion by the prosecution of challenge to a juror who had said it would be very difficult for him to impose the death penalty. (App. 309).

"[T]he question is whether there is fair support in the record for the state court's conclusion that the jurors here would be impartial." *Patton*, 467 U.S. at 1038. Specifically, the relevant question is "did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."[16] *Id.* at 1036.

The answer to the first part of the inquiry is easily discernible because, unlike eight of the twelve *Patton*

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[16] The issue here is not whether the jurors as a whole had such fixed opinions that they were unable to fairly judge the guilt of the defendant because, unlike the petitioner in *Irvin*, 366 U.S. at 720, Mu'Min is not attacking the partiality of the jury as a whole; indeed, he has abandoned his claim that the trial court erred in denying his motion for a change of venue. Rather, he is asserting that the trial court's failure to ask certain questions deprived him of the ability to determine the potential bias of individual jurors. Even if the "jury as a whole" test applied here, however, the test would be met because none of the jurors had any "fixed opinions" about the case.

jurors, each of the jurors who tried Mu'Min indicated expressly that they had formed no opinion about the case at all and could try it solely upon the evidence. (J.A. 48, 52, 72-74, 76, 79-80, 83-86, 88, 90-91, 93).

The second prong of the inquiry must also be answered in the affirmative. Here, as in *Patton*, the trial court questioned the prospective jurors at length; in fact, the court questioned them both as a group and in panels of four and two. Unlike the jurors' responses in *Patton*, however, 467 U.S. at 1038-1039, the answers of the persons who sat on Mu'Min's jury were neither ambiguous nor contradictory.

The jurors here were clear and unequivocal in their responses that they had no opinions about the case and could set aside whatever they had heard or read and decide the case only upon the evidence. They were not hesitant to discuss issues and offer information in response to questions. And, importantly, the trial judge did not hesitate to dismiss any juror who indicated that he had an opinion or who equivocated in discussing the matter.

Any claim that the impartiality of the jury was not properly determined must focus on the jurors who actually sat. *See Ross v. Oklahoma*, 487 U.S. 81 (1988); *Patton*, 467 U.S. at 1037. Of the twelve jurors who actually tried the case, four stated that they had never heard anything about it. (Tr. 4/17/89, pp. 5-7; J.A. 46-48). One of the other jurors said he had not heard anything during the original panel voir dire, but indicated he had during the small panel voir dire. (J.A. 46-48, 79). Six stated that they had read about or discussed the case. (J.A. 46-48). These

seven jurors exposed to outside information about the case were all part of the original twenty-six member panel that had been asked whether they could try the case according to the law as instructed by the judge and on the evidence that they would hear from the witness stand. Each had indicated that he or she could. (J.A. 44).

All twelve jurors indicated that they were not sensible to any bias against Mu'Min; that they understood he was presumed innocent until proven guilty beyond a reasonable doubt; that it was the Commonwealth's burden to prove him guilty beyond a reasonable doubt; that they could not consider the fact that Mu'Min had been indicted and was on trial as evidence of guilt; and that Mu'Min did not have to produce any evidence in his defense. (J.A. 44-46).

The judge then asked the following questions regarding outside sources of information and pretrial publicity:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?
>
> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> Have any of you expressed or formed an opinion of the innocence or guilt of the accused?

> Is there any person who has already formed an opinion as to the innocence or guilt of the accused?
>
> Considering what the ladies and gentleman who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(J.A. 46-48).

Each of the jurors who had heard something about the case indicated that the outside information would not affect his or her impartiality, that he or she had formed no opinion based on the outside source of information, and that the outside source of information would not affect his or her ability to enter the jury box with an open mind and determine Mu'Min's guilt or innocence only on the basis of the evidence presented. (J.A. 48). These jurors were consistent when questioned again along the same lines during the smaller panel voir dire sessions. (App. 275; J.A. 72-80; App. 292; J.A. 84-85).

One of the jurors who had indicated she had heard about the case, Ms. Walters, had discussed the case with her supervisor. She volunteered that the supervisor lived in the same block as the victim. (J.A. 73). The trial judge

allowed Mu'Min's attorney to explore the discussion with the supervisor at length (J.A. 73-74), and to elicit from Ms. Walters the content of the discussion. (J.A. 75). The court encouraged Ms. Walters to reveal any additional content concerning the supervisor's knowledge of the victim. (J.A. 75). In response to repeated questioning by the court over the prosecutor's objections, Ms. Walters said there was no question in her mind about her ability to enter the jury box with an open mind and reach a fair and impartial verdict based only on the law and the evidence. (J.A. 74-75).

Another juror admitted during voir dire he had discussed the case with somebody the previous day who informed him that "there was a murder trial or something on." (J.A. 51). That was the total "content" of his outside knowledge of the case. He indicated he had not read anything about the case, had formed no opinion, and the brief discussion he had had would not affect his ability to enter the jury box with an open mind and decide the case based on the evidence presented. (J.A. 51-52).

In sum, each time a prospective juror equivocated in answering questions related to cause, or indicated a possible bias, the trial judge struck the juror *sua sponte*. Of the twelve who sat, eleven gave absolutely no cause for further inquiry concerning pretrial publicity. The only one who did so was questioned extensively by Mu'Min's counsel. In response to questioning by court and counsel, she disclosed the contents of the remarks she had heard, and her answers convinced an impartial judge that the conversation would not affect her judgment. The record with regard to the twelve jurors who sat in Mu'Min's case

provides strong support for the trial judge's determination of impartiality.

2. There Is No Reason To Doubt The Trial Court's Findings.

It is significant that at the conclusion of the small panel voir dire, Mu'Min did not renew his motion to strike for cause those jurors who had been exposed to outside information. Nor did he renew his motion for a change of venue at that time. Plainly, Mu'Min was sufficiently impressed with the fairness of the panel thus assembled to forego these motions and try his case to a jury picked from this panel.

In *Patton*, this Court recognized the fundamental reality of juror voir dire:

> It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed. . . . Prospective jurors represent a cross section of the community, and their education and experience vary widely. Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. *Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially.*

467 U.S. at 1039 (emphasis added). The trial judge here conducted a lengthy and fair voir dire which revealed neither a fixed opinion nor any predisposition as to guilt

or sentence among the jurors who tried Mu'Min. This Court should defer to those findings of impartiality.

At the time of the motion for a change of venue, defense counsel conceded that *"taking all these articles individually you don't come up with much."* (J.A. 9) (emphasis added). He did not assert that the publicity made a fair trial impossible or even unlikely, and when the trial court thus noted that the motion was premature and that "we just may be able to get a jury," *defense counsel expressly agreed.* (J.A. 12).

The submitted articles include news coverage over four months, from September 26, 1988 to January 14, 1989. The resulting average of four articles per week was not excessive, considering this was an atrocious murder case in a suburban area. The majority of the submitted articles appeared in the Potomac News, a small local paper of limited circulation. They were not inflammatory. Several contained the facts surrounding the crime, investigation and judicial proceedings. Others were criticisms of the Virginia Department of Corrections' road work program.[17]

While some of the reports included information about Mu'Min's prior criminal record, including his 1973 murder conviction, evidence of that murder conviction

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[17] Although Mu'Min referenced additional news articles in his renewal of the motion for change of venue on April 17, 1989, Mu'Min does not now rely upon any such additional articles.

was introduced at trial. (App. 447). Mu'Min's own statement that he stabbed the victim was also admitted at trial. (App. 650).

At the conclusion of the group voir dire, Mu'Min renewed his motion for change of venue, stressing only the amount of publicity rather than the nature of any particular news account. (J.A. 69). The trial judge denied his motion, noting the absence of any effect on the jury from the publicity. (J.A. 71).

No specific publication of clear prejudicial potential was ever cited by defense counsel in connection with his voir dire requests. Mu'Min may not now complain that specific questions were not allowed to assess jurors' exposure to some particular news account. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 602 (1976).

The pre-trial publicity in this case clearly did not create the "extremely inflammatory" background which occurred in *Sheppard v. Maxwell*, 384 U.S. 33 (1966) or *Rideau v. Louisiana*, 373 U.S. 723 (1963) or the "circus atmosphere" found in *Estes v. Texas*, 381 U.S. 532 (1965). *See Murphy v. Florida*, 421 U.S. 794, 798-802 (1975). There is thus no basis for arguing that the jurors' answers should be suspect as a matter of law.

An inquiry into the content of the information jurors had obtained could not have affected the trial court's assessment of impartiality. Petitioner argues that without specific exploration of the source, content and quantity of information that a juror has received, the trial court was

unable to assess whether the juror's statements of impartiality were to be believed. What Mu'Min ignores, however, is the absence of *any* preconceived opinion that would call impartiality into question in the first place.

An examination of the sources and content of a juror's prior knowledge of the case has potential relevance only for the purpose of assessing whether the juror can lay aside a preconceived opinion based on extrinsic information and render a verdict based only on the evidence presented in court. Content questions, however, cannot expose a bias or prejudice that would preclude setting aside an opinion that does not exist.

In view of the great deference owed to the discretion of trial judges to control the conduct of voir dire, this Court has restricted any constitutional requirement of particular inquiry to those exceptional cases where significant and compelling circumstances mandate it. *See, e.g., Turner; Ham; Ristaino.* Those circumstances are not demonstrated where, as here, the nature and extent of the publicity does not give rise to any substantial likelihood of presumptive prejudice, and the voir dire itself completely rebuts any suggestion of actual prejudice.

CONCLUSION

For the foregoing reasons, Mu'Min had no constitutional right to inquire into the content of publicity to which his trial jurors had been exposed. The voir dire was thoroughly and properly conducted, with the result that Mu'Min was tried by a fair and impartial jury. The Commonwealth of Virginia therefore respectfully

requests that the judgment of the Supreme Court of Virginia be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 7 1991
OFFICE OF THE CLERK

No. 90-5193

In The

Supreme Court of the United States

October Term, 1990

DAWUD MAJID MU'MIN,

Petitioner,

v.

VIRGINIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Virginia

REPLY BRIEF FOR PETITIONER

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ARGUMENT IN REPLY

A. The Trial Judge's Opinion that the Jury Panel was Impartial Has No Bearing on the Constitutional Issue Presented in Petitioner's Case.

Respondent argues at length that petitioner is not entitled to relief because the trial judge found the jury panel impartial and this finding is entitled to great deference. Respondent's Brief at 15-18. However, on this record, the trial judge's finding of impartiality cannot cure the constitutional inadequacy of the inquiry that produced it. While a trial judge is best situated to determine an individual juror's competency to serve in a particular case, *see generally Wainwright v. Witt*, 469 U.S. 412, 428 (1985), this determination must be made on the basis of adequate information. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (trial judge's finding of impartiality of individual jurors was made after extensive *voir dire* regarding the media accounts to which jurors had been exposed). Indeed, as the Court has noted, without "an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981).

In this case, of course, the constitutional violation arose from the fact that the judge refused to ask or permit proper *voir dire* questions. Because the *voir dire* was wholly inadequate to determine the effects of the pervasive prejudicial pretrial publicity, the trial judge's finding of impartiality is unreliable, and cannot be accorded the deference to which such findings are normally entitled.

Cf. Pate v. Robinson, 383 U.S. 375, 386 (1966); *Groppi v. Wisconsin*, 400 U.S. 505, 508 n. 5 (1971).

B. Petitioner does not Advocate a Rule that Would Remove the Trial Court's Discretion or Needlessly Prolong or Complicate the Jury Selection Process.

Respondent makes a number of points that can best be characterized as "parade of horribles" arguments. Respondent's Brief at 30-34. First, respondent asserts that petitioner seeks to completely eliminate a trial judge's discretion whether to permit questions regarding prejudicial pretrial publicity, as well as discretion to regulate the scope and nature of the questioning. This is simply incorrect. Petitioner's opening brief acknowledges that a trial judge has broad discretion to determine in a particular case the best means of detecting juror bias. However, as with many other decisions that are placed in a trial judge's discretion, his judgment is not absolute, nor is the exercise of his discretion beyond review. In order to safeguard the constitutional right to a fair and impartial jury the rule must be that the trial judge is required to conduct an *adequate* inquiry under the circumstances. Neither the adequacy of the inquiry nor the danger of a biased jury presented by the circumstances can be left entirely to the unreviewable judgment of the trial judge. There will be circumstances under which the trial judge *must* conduct a probing *voir dire* inquiry regarding adverse pretrial publicity. It is for this reason that due to the compelling circumstances of this case – where the publicity was

particularly powerful in content, volume and tone[1] – the trial judge was obligated to permit at least some *voir dire* questioning regarding the jurors' exposure to prejudicial news accounts. Petitioner's Brief at 37-38; *see also Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Respondent also asserts that if petitioner prevails, *voir dire* will necessarily be extensive and prolonged in every case. This is simply not true. As the dissenting Justices of the Virginia Supreme Court noted, petitioner did not (and does not) seek "to propound any question he wished, or to extend voir dire questioning *ad infinitum*." *Mu'Min v. Commonwealth*, 239 Va. 433, 454, 389 S.E.2d 886, 899 (1988); J.A. 118. Rather, after making a substantial showing of pervasive prejudicial media coverage of this case, defense counsel sought to have the trial judge ask several minimally intrusive questions regarding the

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[1] Similarly, respondent's contentions that the news accounts in petitioner's case were not "uniquely involved, or 'inextricably bound up' in the facts of Mu'Min's case in such a way as to inflame or 'intensify' any juror's possible bias," *see* Respondent's Brief at 24, is equally wrong. The press accounts did not involve standard crime reporting. Rather, petitioner's case was caught in a national atmosphere of near hysteria involving crimes committed by incarcerated persons. *See* Petitioner's Brief at 5-9; *see also Mu'Min v. Commonwealth*, 239 Va. at 454, 389 S.E.2d at 899; J.A. 118.

In this regard, it is important to note that the majority of the Virginia Supreme Court did not dispute the three dissenting justices characterization of the news accounts as unusual and prejudicial. Rather, in the majority's view, the volume, nature and content of the publicity was irrelevant. It believed that a criminal defendant was never entitled to know what news accounts potential jurors had been exposed to.

media coverage. *See Turner v. Murray*, 476 U.S. 28, 38 (1986). At most, the questions propounded by petitioner's counsel would have added a few hours to the jury selection process in this capital case.[2] Certainly, after a showing such as was made here – an unusual amount of prejudicial publicity to which the overwhelming majority of the panel had been exposed[3] – the few questions requested by petitioner's counsel would have constituted a minimal addition to the jury selection process.[4] *Cf. Gardner v. Florida*, 430 U.S. 349, 359-60 (1977) (plurality opinion).

Respondent's dire predictions recall the similar warnings which the Virginia Attorney General sounded in *Turner v. Murray, supra*. There, the Virginia Attorney General's Office maintained that if Turner prevailed, *voir dire* would be needlessly protracted. Brief for Respondent, *Turner v. Murray* at 15-16. The assertion is as meritless in petitioner's case as it was in *Turner*. Quite simply, there is no reason to believe that a ruling in petitioner's

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[2] The entire jury selection process took substantially less than a trial day.

[3] As respondent concedes in its brief, at least eight of the twelve jurors who were ultimately seated in this case had read news accounts regarding the case.

[4] Furthermore, it is important to keep in mind that for petitioner to prevail this Court does not have to determine that the exact questions (either in form or in number) should have been asked. *See generally Mu'Min v. Commonwealth*, 239 Va. at 457-58, 389 S.E.2d at 901; J.A. 122. Regulation of the questioning will still be left to trial judges. In this case, the trial judge permitted no questions whatsoever regarding the content of the juror's exposure to prejudicial pretrial publicity, and it is this ruling which comprises the constitutional violation.

favor in this case would have any adverse administrative impact either.

C. Respondent's Interpretation of *Turner v. Murray* is Unduly Restrictive.

A large portion of respondent's brief is spent attempting to convince the Court that *Turner v. Murray*, 476 U.S. 28 (1986), only applies in cases which involve the risk of racial discrimination influencing a capital sentencing jury's decision whether or not to impose the death penalty. *See* Respondent's Brief at 28-31. This view of *Turner* is erroneous.

While it is true that the specific facts of *Turner* had to do with racial prejudice infecting the discretion afforded a jury at the sentencing phase of a Virginia capital trial, this Court's decision cannot be read in a vacuum. The *Turner* Court drew upon *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristiano v. Ross*, 424 U.S. 589 (1976); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981), as well as a number of the capital decisions of this Court, in the process of invalidating a death sentence obtained under circumstances where the trial judge failed to permit any *voir dire* regarding racial bias in a case involving an interracial crime. Thus, seen from the proper vantage point, *Turner* is just one case in a series of decisions by this Court which stand for the broader due process principle that a trial judge is obligated to take whatever steps are necessary in order to safeguard a defendant's right to a verdict based solely on the evidence and the relevant law.

Turner, of course, did acknowledge that the risk that extraneous influences may affect the jury's ability to render a verdict based only on the record evidence and relevant legal principles is especially high during the sentencing phase of a capital case involving an interracial crime, such as petitioner's case. However, it did not hold that the only questions a capital defendant is constitutionally permitted to ask in a capital trial are those which have to do with racial animus. Rather, *Turner* and its antecedents are rooted in the more general constitutional guarantee that all the circumstances of a particular case must be considered in determining a trial judge's responsibility to secure a capital defendant his right to a fair and impartial jury at both phases of a bifurcated trial.

D. Petitioner's Eighth Amendment Claim was not Waived in the State Courts.

Respondent asserts that to the extent that petitioner relies upon the Eighth Amendment, his claim is not properly before the Court. Respondent's Brief at 26-27. This contention is erroneous.

At trial, petitioner's counsel repeatedly relied upon the Eighth Amendment in support of his request to ask potential jurors about the content of the publicity to which they had been exposed. *See, e.g.*, J.A. 41, 64, 69, 70. On direct appeal to the Virginia Supreme Court, as respondent concedes, *see* Respondent's Brief at 26, petitioner referred to the greater demand for reliability required by the Constitution in capital cases. Similarly, in the petition for rehearing filed in the state courts, petitioner discussed the death penalty aspects of the case and

cited in this Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976). *See* Petition for Rehearing at 3; *see also Taylor v. Illinois*, 484 U.S. 400, 406-07 n. 9 (1988) (Sixth Amendment claim properly preserved where counsel cited several Sixth Amendment decisions of this Court in the state appeal brief).

Furthermore, one of the questions specifically presented in the petition for certiorari was whether the trial court's actions in this case violated the Eighth Amendment. Pet. for Cert. at i. Respondent did not object to the so-called "generic reference" to the Eighth Amendment by means of a brief in opposition to the petition, and its attempt to assert a procedural bar to petitioner's Eighth Amendment claim now is an inappropriate afterthought. Because respondent did not make this argument in a brief in opposition to the petition for writ of certiorari, it should be deemed waived. *See* Rule 15.1 of the Rules of the Supreme Court of the United States; *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).[5]

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[5] Equally incorrect is respondent's contention that petitioner's counsel complained only of the amount of publicity and not any specific prejudicial information in the news accounts. Respondent's Brief at 43. Trial counsel specifically referred to a number of prejudicial facts in the publicity which warranted *voir dire*, including the fact that petitioner allegedly confessed to committing this crime, petitioner's alleged involvement in another offense, the political furor which occurred in the aftermath of this offense, and comments about the case made by politicians and candidates for office. *See* J.A. 9-13.

CONCLUSION

For the reason set forth above and in petitioner's opening brief, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5193

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DAWUD MAJID MU'MIN,

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vs

THE COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL JURY PROJECT AMICUS CURIAE IN SUPPORT OF PETITIONER

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THE COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

MOTION FOR LEAVE TO FILE BRIEF OF NATIONAL JURY PROJECT AS AMICUS CURIAE

Pursuant to Rule 37.4 of the rules of this Court, *amicus* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of Respondent's counsel to provide consent.

The National Jury Project [NJP] is a not-for-profit corporation established in 1975 for the purpose of studying all aspects of the American jury system and maintaining and strengthening that system. The NJP

maintains offices in Philadelphia, Pennsylvania, Minneapolis, Minnesota, and Oakland, California, providing consultative and educational services to attorneys and social science professionals in criminal and civil litigation in federal and state courts throughout the United States.

The National Jury Project has assisted attorneys in jury selection in thousands of civil and criminal trials. Many of these have been cases in which there has been extensive pre-trial publicity.

The NJP has authored three texts, *Jurywork: Systematic Techniques* (2d ed 1983), *Women's Self-Defense Cases: Theory and Practice* (1981) and *The Jury System: New Methods of Reducing Prejudice* (1975). Members of the NJP have written numerous articles for legal and social science journals and contributed to texts on subjects related to *voir dire* and the jury selection process. NJP members are frequent speakers at training seminars for criminal and civil trial lawyers throughout the United States, including, *inter alia*, seminars conducted by the American Bar Association, the Practicing Law Institute, the American Trial Lawyers Association and the National College of Criminal Defense.

NJP members have been invited to give testimony before Congressional committees and committees of numerous state legislatures. The NJP has conducted more than one hundred surveys of public opinion concerning criminal justice issues and analyzed the content and impact of pretrial publicity in hundreds of cases. Based on this research and experience, NJP members have submitted declarations and affidavits in numerous cases on issues of pretrial publicity, venue, jury composition, survey research, jury selection procedure, the use of peremptory challenges and strike procedures and have been qualified as expert witnesses in numerous federal and state courts. NJP research was cited with approval by the California Supreme Court in *People v Williams*, 29 Cal3d 392, 628 P2d 869 (1981).

From its members' studies of the relevant fields of social science and their extensive work and observations in individual cases, the National Jury Project has developed a broad understanding of how the conditions under which *voir dire* is conducted affect the behavior of prospective jurors.

Accordingly, *amicus* has a strong interest in the outcome of this case.

For the foregoing reasons, *amicus curiae* respectfully request that they be allowed to participate in this case by filing the annexed brief *amicus curiae*. *Amicus* are in the unique position to aid the Court in its consideration of the issues presented. The interests of *amicus* are direct and substantial. The participation of the *amicus* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear.

WHEREFORE, *amicus curiae* National Jury Project respectfully request that their motion for leave to file an *amicus curiae* brief in support of petitioner be granted.

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MISCELLANEOUS:

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INTEREST OF THE AMICUS

The interest of *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

This Court and individual justices of this Court, lower courts and numerous commentators and social scientists have long noted the unreliability of prospective jurors' self-assessments of impartiality.

Voir dire is essentially an interview process conducted in an environment that is unfamiliar and foreboding to prospective jurors. Particularly in cases in which there has been extensive pretrial publicity, a substantial number of jurors are likely to be unaware of their own biases or unwilling to be open about them, particularly in a group setting. They are likely to feel internal and external pressure to conform their answers to what they believe to be socially acceptable responses.

Conditions of *voir dire* operate to inhibit or encourage candid responses from potential jurors. Closed-ended, conclusory questions posed to the group as a whole are far less likely to elicit information than are open-ended questions that encourage prospective jurors to describe their experiences, attitudes and opinions in their own words.

A trial court's reliance on prospective jurors' assertions of their own ability to set aside opinions as a basis for determining qualification to serve is an abdication of judicial responsibility for the reason that it relies on

jurors' own assessments of fairness without an independent judicial determination.

In a high publicity case, particularly in a case in which the jury may impose the death penalty, the mere posing of self-assessment questions is constitutionally inadequate. The Sixth and Fourteenth Amendments require that the scope of *voir dire* be broad enough to permit the court to identify and eliminate all biased jurors.

ARGUMENT

IN A HIGH PUBLICITY CASE, JURORS' SELF-ASSESSMENTS OF IMPARTIALITY ARE INHERENTLY UNRELIABLE, AND U S CONST, AM VI & XIV, REQUIRE THE TRIAL COURT TO EXPLORE ON *VOIR DIRE* THE SCOPE AND UNDERLYING BASIS OF PROSPECTIVE JURORS' KNOWLEDGE, ATTITUDES AND OPINIONS AS TO THE CASE IN ORDER TO DETERMINE FOR ITSELF PROSPECTIVE JURORS' IMPARTIALITY AND PERMIT COUNSEL TO MAKE A MEANINGFUL RECORD AS TO CHALLENGES FOR CAUSE.

Introduction.

The jury selection process is primarily an interview process. This and other courts and the social sciences have recognized that, in a high publicity case, many jurors come into the courtroom with biases and prejudices. Some of these biases result from what the jurors have read or seen in the media, others from discussions they have had in the community. If these biases go undetected, the accused's right to a fair jury trial is lost. Merely eliciting prospective jurors' affirmative responses

to questions asking whether they can set aside prejudicial opinions is an unreasonable reliance by the trial judge on jurors' self-assessments of fairness and an abdication of judicial responsibility.

A.

The law has long recognized the unreliability of jurors' assessments of their own impartiality in high publicity cases.

Long before modern social science began trying to quantify and analyze human behavior, Chief Justice Marshall, sitting as trial judge in *United States v Burr*, 25 Fed Cas 49 (case #14, 692g, 1807), noted the inherent danger of seating a prospective juror with preconceptions about the case to be tried. Foreshadowing the concerns of this and other courts about jurors' self-assessments of fairness, Marshall observed that protestations of neutrality are not to be trusted:

> Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him. . . . He will listen with more favor to that testimony which confirms, than to that which would change his opinion.

This Court and individual justices have subsequently expressed similar concerns about the reliability of jurors' self-assessments of fairness in high publicity cases. In *Irvin v Dowd*, 366 US 717 (1961), for example, the Court stated that, while "[i]t is sufficient if the juror can lay

aside his impression or opinion and render a verdict based on the evidence presented in court . . . [t]he adoption of such a rule . . . 'cannot foreclose inquiry as to whether, in a given case, the application of the rule works a deprivation of the prisoner's life or liberty without due process of law.' " *Id.* at 723 (cite omitted). Deeper probing is required for the reason that "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Id.* at 727.

As to individuals exposed to prejudicial publicity and asserting an ability to be fair despite pre-formed opinions, this Court continued:

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellow is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.

See also *Murphy v Florida*, 421 US 794, 800 (1975) ("the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate . . . 'the presumption of partiality' "); *Sheppard v Maxwell*, 384 US 333, 351 (1966), citing *Irvin, supra*.

See also *Patton v Yount*, 467 US 1025, 1044 (1984) (Stevens and Brennan, JJ., dissenting) (noting that the record "suggests that some veniremen might have been tempted to understate their recollection of the case");[1]

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[1] The extensive scope of *voir dire* in *Patton* stands in stark contrast with the total absence of probing in the case at bar. Cf. 467 US at 1033-1034.

Smith v Phillips, 455 US 209, 221-222 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased . . . is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."); *Nebraska Press Association v Stuart*, 427 US 539, 602 (1976) (Brennan, Stewart and Marshall, JJ., concurring); *United States v Dennis*, 339 US 162, 183 (1950) (Frankfurter, J., dissenting) ("Men ought not to be asked in effect whether they are brave or wholly indifferent to the enveloping atmosphere . . . nor should it be assumed that they are fully conscious of all the pressures that may move them.")

Numerous lower federal courts and individual judges have expressed the same or similar opinions. In *United States v Davis*, 583 F2d 190, 197 (5th Cir 1978), for example, the Fifth Circuit stressed that "[t]he juror is poorly placed to make a determination as to his own impartiality." The court also reiterated both its past criticism of "the trial court's asking the jury as a whole if anyone was exposed to publicity that would prevent him from impartially deciding the case" and its admonition that content questions should be asked and an independent determination as to partiality made by the trial court. Continuing, the court stated:

> "[T]his Circuit has determined that it is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they may have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the

> prejudicial effect and it should make an independent determination whether the juror's impartiality was destroyed." 583 F2d at 197, citing *United States v Hyde*, 448 F2d 815, 848 (5th Cir 1971) at n 38.

The Seventh Circuit echoed a comparable sentiment in *United States v Dellinger*, 472 F2d 340, 367, 375 (7th Cir 1972):

> We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.
>
> Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial. The juror might well answer negatively and in good faith without stopping to consider the significance or firmness of impressions he might have gained from news reports.

See also *Coleman v Kemp*, 778 F2d 1487, 1541-1543 (11th Cir 1985); *McCoy v Goldston*, 652 F2d 654, 657 (6th Cir 1981); *United States v Ledee*, 549 F2d 990, 993 (5th Cir 1977); *United States v Bear Runner*, 502 F2d 908, 911-913 (8th Cir 1974); *United States v Silverthorne*, 400 F2d 627, 637-638 (9th Cir 1968); *Kiernan v Van Schaik*, 347 F2d 775, 779 (3d Cir 1965); *United States ex rel Bloeth v Denno*, 313 F2d 364, 372 (2d Cir 1963); *Delaney v United States*, 199 F2d 107, 112-113 (1st Cir 1952).

When *voir dire* questioning is successful at revealing bias, biased jurors are excused, and no jury selection issue comes to the attention of the appellate courts. The only examples that receive appellate notice, then, tend to be the most egregious ones. In nearly every instance in

which an appellate court has had to consider whether the *voir dire* in a case failed to protect the accused's right to a fair jury trial, the issue could have been avoided by an adequate *voir dire*.

In *Isaacs v Kemp*, 778 F2d 1482 (11th Cir 1985), for example, jurors were seated after what the court termed a "conclusory *voir dire*". A post-trial hearing later revealed that one juror had, in fact, sat through the trial of a co-defendant and had been exposed to the most damaging evidence against the defendant before trial began. The court attributed the problem to the conclusory nature of the *voir dire*. *Coleman, supra*, 778 F2d at 1543, n26, citing *Isaacs, supra*.

The highly publicized 1976 Massachusetts murder and bank robbery trial of Susan Saxe demonstrates that adequate *voir dire* can reveal the specific information, attitudes and opinions that may be hidden behind general assurances of impartiality. More than one-fourth of the 146 jurors excused for having already formed an opinion in that case had denied at least once that they had any opinion. Most striking, one prospective juror denied repeatedly that she had any opinion. She had read newspaper accounts about the case and "knew all about this naturally", but she repeatedly asserted that she could be fair, specifically denying any personal interest in the case or awareness of any bias or prejudice or inability to be impartial and repeatedly denying any opinion as to the defendant's guilt or innocence. When finally asked what she thought the defendant had done, however, the juror admitted, "Well, we all know what she has done . . .we all know the girl went in and held up the bank and the policeman was shot there." *Commonwealth v Saxe*,

Suffolk Cty Super Ct #51775-77 (1976), *voir dire* of juror #54, transcript reprinted in *Jurywork: Systematic Techniques* (2d ed 1983) at 10-46.1 -- 10-49.[2]

An October 30, 1979, letter from Hon. Prentice H. Marshall, United States District Judge for the Northern District of Illinois to Hon. Jim R. Carrigan, United States District Judge for the District of Colorado, further illustrates jurors' tendencies to overlook their own biases. Looking back at his experiences when he began permitting counsel to pose questions to prospective jurors, Judge Marshall wrote:

> Immediately Judge Norman's assertion was confirmed. A juror here and there who had assured me he or she could be fair and held no biases or prejudices admitted to a lawyer a profound bias, e.g. against police officers, black persons, etc. Then this fall the classic example occurred. I was presiding at a criminal case in which a labor union was a defendant. My inquiry addressed anti-union bias; virtually every prospective juror responded they had none and could be fair.
>
> The lawyer for the union . . . on supplemental examination elicited admissions of prejudice from *eleven* prospective jurors who were excused for cause. (emphasis in original; reprinted with permission)

[2] See also the *voir dire* in the highly publicized 1971 New Haven, Connecticut, trial of then-Black Panther Party leader Erica Huggins. One of the prospective jurors had consistently answered the judge's questions with assurances that she could be fair. When defense counsel was permitted to supplement the judge's questions, however, she stood directly behind the defendant and asked whether there was "anything about your attitudes or experiences . . . that would make you unable to . . . reach an unbiased verdict." The juror looked at Ms. Huggins and blurted out, "She's guilty!" *Connecticut v Huggins*, New Haven Super Ct #15681 (1971), reported in Ginger, "What Can Be Done to Minimize Racism in Jury Trials," 20 J Pub L 427, 437 (1971).

One commentator's review of *voir dire* transcripts in highly publicized cases has led to the identification of a "minimization effect" in jurors' responses. Bronson, "The Effectiveness of Voir Dire in Discovering Prejudice in High-Publicity Cases: An Archival Study of the Minimization Effect," presented at 25th Anniversary Meeting of Law and Society Assn, Madison, Wisconsin, June 8-11, 1989. When asked about knowledge about the case, jurors initially tend to preface their remarks with phrases such as, "I only glanced . . . ", "Nothing but . . . " or "Just what I saw in the papers . . . " Such comments are frequently followed by assurances that despite exposure to publicity or discussion, the juror has not formed any opinion. Bronson found that prospective jurors' initial denials of case knowledge or bias were often followed with answers revealing both. In one murder case, for example, a juror who had assured the judge that she knew nothing about the case later acknowledged that, through her work at the hospital where the autopsy on the deceased had been performed, she had developed such strong feelings that she could not be impartial. *Id.* at 41.

Other commentators have noted "jurors' tendency to exaggerate their self-reported ability to be impartial." 1978 Report of the American Bar Association Committee on Fair Trial and Free Press.

The combined tendency of jurors to minimize their exposure to publicity and to exaggerate their own assessments of their ability to be fair is most often not the result of juror fabrication or manipulation. Rather, it is the product of a number of factors that conspire to make the detection of bias extremely difficult. Perhaps most important among these is that *voir dire* is an encounter between lay people and the law.

The very language used in the courtroom is constrained by legal meanings not evident to lay persons untrained in the law. Scholars have explored the roadblocks to comprehension when jurors are instructed at the end of a trial, with considerable attention having been given to ways in which comprehension can be improved.[3] Less attention has been focused on comparable roadblocks that exist at the start of the trial. The prospective juror who simultaneously affirms that she can be fair while believing that "we all know what she has done", for example, is not lying; she does not understand the language of the courtroom or know that what she knows to be a fact is, in the eyes of the law, an unfair prejudgment. Such barriers at the beginning of the trial can

[3] Charrow and Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Columbia L Rev 1306 (1979); Strawn and Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976); Sales, Elwork and Alfini, *Making Jury Instructions Understandable* (1981); Severance and Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Instructions," 17 L and Soc Rev 153 (1982); Report of Comm on Juries of Judicial Council of Second Circuit (1984); Bermant et al., "Protracted Civil Trials: Views from the Bench and the Bar," Fed Judicial Ctr (1981).

undermine the entire system of trial by jury if reliance upon jurors' self-assessments of impartiality results in biased and unqualified jurors sitting in judgment of persons accused of crimes.

B.

The unreliability of jurors' self-assessments of fairness in high publicity cases is the product of *voir dire* conditions poorly designed to identify or eliminate juror biases.

The unreliability of jurors' self-assessments of fairness is not coincidental. Particularly in a high publicity case, it is the predictable result of the manner in which the process is carried out.

Voir dire is, first and foremost, an interview. As in any interview, the quality of the information obtained during *voir dire* is controlled by the conditions under which the *voir dire* is conducted, the type of information sought and the interviewee's perceptions of the end result of the interview. Extensive empirical research in social psychology has long recognized that attitudes and behavior are influenced by situational conditions and that the characteristics of a given setting often determine behavior more significantly than do the personality characteristics of the person in the setting. Mischel, *Personality and Assessment* (1968); Sarbin, "Contextualism: A World View for Modern Psychology," in Cole (ed), *Nebraska Symposium on Motivation* (1976).[4]

[4] These empirical research findings are confirmed by the observations of experts in jury behavior. Bennett, "Psychological Methods of Jury Selection in the Typical Criminal Case," 4

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To a prospective juror coming into a courtroom for the first time, the courtroom is an unfamiliar, formal place presided over by a robed authority figure talking in language far removed from the juror's everyday speech. The juror is seated in the open, surrounded by strangers, and he or she is asked long, often confusing questions about legal concepts he or she may never have considered. The juror is also aware that he or she will be included in or excluded from the jury based on the answers he or she gives to questions. How these circumstances affect the quality of information obtained has been the subject of substantial empirical research.

Most people aware of being evaluated become concerned about their performance, and this "evaluation apprehension" influences responses given. Rosenberg, "When Dissonance Fails: On Eliminating Evaluation Apprehension from Attitude Measurement," 1 J Personality and Soc Psychology 28 (1965). Awareness of the consequences of various responses can further affect the way attitudes and beliefs are expressed. Collins and Hoyt, "Personal Responsibility for Consequences: An Integration of the Forced Compliance Literature," 8 J Experimental Soc Psychology 558 (1972). People being evaluated are also susceptible to "social comparison

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Crim Def 11 (1977); Broeder, "Voir Dire Examinations: An Empirical Study," 38 S Cal L Rev 503 (1965); Frederick, *The Psychology of the American Jury* (1987); Smith and Malandro, *Courtroom Communication Strategies* (1988 supp); Starr and McCormick, *Jury Selection: An Attorney's Guide to Jury Law and Methods* (1985); Suggs and Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Indiana L J 245 (1981).

information" – indications from others as to the appropriateness of their behavior, attitudes and feelings. Festinger, "A Theory of Social Comparison Processes," 7 Human Relations 117 (1954); Schacter, *The Psychology of Affiliation* (1959). Even without intending to do so, many people devote considerable attention to how they are received, and they adopt behaviors they believe will allow them to leave an embarrassing situation as quickly as possible. Arkin et al., "Social Anxiety, Self-Presentation and the Self-Serving Bias in Causal Attribution," 38 J Personality and Soc Psychology 23 (1980).

Most people seek naturally to present themselves in the best possible light – for example, portraying themselves as fair rather than unfair, honest rather than dishonest. In *voir dire*, the most socially desirable characteristics to display are fairness and impartiality. The typical *voir dire* encourages jurors to conform their behavior to the behavior of others, giving short answers tailored to what they perceive to be socially acceptable. Suggs and Sales, *supra*; Carroll, "Speaking the Truth: Voir Dire in the Capital Case," 3 Am J Trial Advocacy 199 (1979). The pressure jurors understandably feel to act the part of the good citizen who is fair and impartial interferes with their ability to be open and honest about prejudicial attitudes or opinions. Smith and Malandro, *supra*; Starr and McCormick, *supra*.

When the questioning of the jury panel is conducted by the judge, there are yet additional inhibiting factors at work unless the judge consciously works against them. The judge is the highest authority figure in the courtroom, and prospective jurors not only respect the judge, they wish to avoid appearing in an unfavorable light in

his or her eyes. They, therefore, take from the judge their verbal and non-verbal cues as to what behavior is expected and acceptable and tend, intentionally or otherwise to conform their answers to what they feel the judge wishes to hear.[5]

The natural human tendency to conform would not be problematic if jurors entered the courtroom as "blank slate". Jurors, however, bring into the courtroom a set of experiences and attitudes accumulated over a lifetime. Many of these are emotionally charged, and some are prejudicial and deeply held in ways that directly affect their ability to be impartial in a criminal case. Surveys of prospective jurors conducted throughout the country by the National Jury Project, for example, reveal that as many as fifty per cent of persons eligible for jury service

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[5] Cf., e.g., Note, "Judges' Non-verbal Behavior in Jury Trials: A Threat to Judicial Impartiality" 61 Va L Rev 1266 (1975); Suggs and Sales, *supra*. Greater candor in response to questions posed by lawyers is also attributed to lawyers asking more specific questions as a result of their greater knowledge of the case and to jurors' perceptions of lawyers as being biased on behalf of their clients. For the latter reason, lawyers' participation in the questioning implies a right to the participation of "biased" parties; therefore, "biased" answers become more socially acceptable than where the questions are posed by the judge. Cf., e.g., Padawer-Singer, Singer and Singer, "Voir Dire by Two Lawyers: An Essential Safeguard," 57 Judicature 386 (1974).

For reasons such as these, numerous commentators have argued for a right to attorney-conducted *voir dire*. Cf., e.g., Padawer-Singer et al., *supra*; Jones, "Judge-Versus-Attorney-Conducted Voir Dire," 11 L and Human Behavior 131 (1987). Virginia law allows attorneys directly to question prospective jurors. Virginia Code, sec 8.01-358.

would require a criminal defendant to prove his or her innocence despite a judge's instructions to the contrary. Nearly as many believe that if the prosecution has gone to the trouble of bringing a defendant to trial, he or she is probably guilty. *Jurywork: Systematic Techniques, supra*, sec 2.04[2][a] and studies cited therein; see especially figure 2.1. National surveys conducted by independent pollsters confirm these findings.[6]

In a highly publicized case, jurors may also bring "information" and opinions gleaned from the media, neighbors or relatives, including awareness of inadmissible evidence and/or sensationalized characterizations of the charged offense and the accused's alleged role in it.[7]

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[6] See National Center for State Courts, "The Public Image of the Courts: Highlights of a National Survey of the General Public, Judges, Lawyers and Community Leaders" (1978) at 6; Turner, "Tabulation of Attitude Data on Criminal Justice Issues from a National Survey," National Research Council-National Academy of Sciences (1979)[unpublished manuscript].

[7] Crime news tends to dominate local news coverage, Carroll et al., "Free Press and Fair Trial: The Role of Behavioral Research," 10 Law and Human Behavior 187, 190 (1986) and studies cited therein, and most of what is reported is obtained from police sources and presents the prosecution side of the case. *Id*. Persons who follow such news and recall details of what is reported are more likely than others to feel prosecution-oriented. They are, however, *"no less likely to feel they could hear the evidence with an open mind." Id*. (emphasis added); Constantini and King, "The Partial Juror: Correlates and Causes of Prejudgment," 15 L and Soc Rev 9 (1980).

See also Hvistendahl, "The Effect of Placement of Biasing Information," 56 Journalism Quarterly 863 (1979), citing a study by Columbia University Professor Alice Padawer-Singer

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Because there are both conscious and unconscious reasons why jurors are either unable or unwilling to recognize and reveal their own biases, *voir dire* questions must be designed to encourage jurors to express their opinions in their own words. The questions posed by the trial court in this case – "Is there . . . ?" "Would . . . ?" – appear calculated to achieve the *opposite* result; they are closed-ended, leading questions that inform prospective jurors the correct answer is "no" or which can easily be answered with no response at all. In contrast, the questions proposed by defense counsel – "What have you seen, read or heard about this case?" "What did you discuss?" "What is your opinion" – were open-ended. Had they been asked, these questions would have elicited the information necessary for the court and counsel to assess prospective jurors' ability to be fair in accordance with the legal principles applicable in a criminal case.

In addition, where, as a result of prejudicial pretrial publicity or for other reason, biased jurors are seated, the

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in which taped testimony from an actual murder trial was submitted to panels of juries drawn from regular jury pools. Prior to the mock trials, one half of the juries were presented with simulated news articles reporting that the accused had a prior criminal record and had made a confession he had later retracted. Eighty percent of the jurors exposed to the "news" accounts voted to convict while only 39% of the control group jurors would have found the defendant guilty.

See also Sue, Smith and Gilbert, "Biasing Effects of Pretrial Publicity on Judicial Decisions," 2 J Crim Justice 163 (1974); Sue, Smith and Pedroza, "Authoritarianism, Pretrial Publicity and Awareness of Bias in Jurors," 37 *Psychological Reports* 1299 (1975).

resulting prejudice to the accused cannot be eliminated through curative instructions. Carroll et al., *supra*, at 194-195 and studies cited therein; Strawn and Buchanan, *supra*. See also *Groppi v Wisconsin*, 400 US 505 (1975).[8]

For these reasons, prospective jurors' self-assessments of impartiality in high publicity cases are the understandably unreliable product of the normal conditions of *voir dire*.

C.

In a high publicity case, only a thorough and probing *voir dire* calculated to explore prospective jurors' sources and knowledge of the case can assure that biased jurors are identified and excused for cause.

The extent to which *voir dire* is successful in uncovering juror bias depends in large part on the willingness of trial judges and attorneys to recognize the relationship between the conditions of *voir dire* and their role in overcoming its shortcomings.

In order to identify and eliminate juror bias in high publicity cases, the Sixth and Fourteenth Amendments require far more than the conclusory questions asked here. At a minimum, *voir dire* questions in high publicity cases should address not only *whether* a juror has read or heard about the case but also the *sources* of his or her information and the *exact nature* of the information the

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[8] Consider also Justice Jackson's well-known admonition from his concurring opinion in *Krulewitch v United States*, 336 US 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

juror possesses. The details of prospective jurors' exposure to prejudicial pretrial publicity and/or other extra-evidentiary sources of information must be probed sufficiently to permit fair determination by the court of challenges for cause and provide an appropriate opportunity for counsel to make a record for appeal.[9]

In addition, the right to a fair jury trial demands that *voir dire* be conducted in a manner that will encourage candid answers from prospective jurors, thus allowing the trial judge to make an informed and independent determination as to each juror's ability to be fair and impartial. Questions posed to prospective jurors about their attitudes should be open-ended. The questions posed as to the sources, nature, and extent of jurors' knowledge of extra-evidentiary material, for example, should be phrased, "What have you read or heard?" "Where did you hear or read about this?" The court should also be careful to follow-up with jurors who say they only know what they "have read in the paper" and be sensitive to the desires of jurors to minimize their responses, whether for reasons of nervousness in a public speaking situation or not wishing to appear biased. Only

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[9] Concerns about time may be alleviated by requiring counsel to submit proposed questions to the court prior to the beginning of trial and by the submission of a supplemental written questionnaire to prospective jurors in advance of trial. Submission of such questionnaires in advance of trial is becoming an increasingly accepted information-gathering and time-saving practice in state and federal courts throughout the country. For a partial list of cases in which this procedure has been utilized, see *Jurywork: Systematic Techniques, supra*, figure 2.6.

by allowing prospective jurors to use their own words to describe the information sought can the court be assured of distinguishing between jurors who have formed prejudgments and those who have not.[10]

The case at bar was a highly publicized case in which there was a high probability of prejudice. The failure to conduct *voir dire* in a manner capable of identifying or eliminating biased jurors violated the Petitioner's Sixth and Fourteenth Amendment rights by failing to assure him a trial by a fair and impartial jury. Particularly where

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[10] Other ways in which the conduct of *voir dire* can be improved to encourage juror candor include:

The nature of the proceedings to follow and the jurors' role in them should be explained to jurors in words they can understand.

In all cases, jurors should be examined individually or in small groups. Individual, sequestered *voir dire* is recommended in high publicity cases. Cf., e.g., *United States v Giacalone*, 588 F2d 1158, 1162 (6th Cir 1978); *United States v Starks*, 515 F2d 112, 125 (3d Cir 1975); *United States v Bryant*, 471 F2d 1040, 1044-1045 (DC Cir 1972); American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, sec 3.4(a).

The questioner should convey his or her own openness and interest in what the juror is saying. Follow-up questions, where called for, should acknowledge the emotional content of the juror's answer as well as its substance, and they should be based on both the substance and emotional content of that answer.

Finally, the interview should be conducted in a manner that conveys to prospective jurors the court's acceptance of whatever answers are given; that is, that there are no "right" or "wrong" answers so long as the answers given are candid and honest.

the jury selected as a result of such a severely truncated procedure determines not only guilt or innocence but also whether the defendant is to live or die, such a failure requires that the resulting judgment be set aside. Cf. *Turner v Murray*, 476 US 28 (1986).

RELIEF REQUESTED

For all the reasons stated above, *Amicus* National Jury Project requests that the judgment of the Supreme Court of Virginia be reversed.

Respectfully submitted,

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Dated: December 7, 1990